JURISDICTION AND ITS IMPACT ON STATE POWERS

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The federal government itself, a delegatee of powers, exercises these latter in numerous economic fields through the medium of regulating boards, commissions, and agencies. Whether or not it has delegated any such power to a board, the type or types so conferred, their extent, and the manner of their exercise, involves another and separate question. We discuss both, but emphasize the second, of these questions, confining ourselves to the area of labor-management relations and still further delimiting the analysis in other ways, e.g., the Railway Labor Act covers railroads and airlines, so that carrier-employee relations are removed from the area of discussion.[1] Specifically, we consider the constitutional, statutory, and discretionary jurisdiction of the National Labor Relations Board and the legal, economic, and political backgrounds of such jurisdictions as factors in their development and current exercise, emphasizing throughout the conflict with the states which results from the existence, delegation, and exercise or non-exercise of powers under these concepts.

1.) THE CONSTITUTIONAL JURISDICTION OF THE LABOR BOARD

The federal powers are not alone specific but also general, so that while it may be said that, among other particular grants, Congress may coin money and declare war, and the President may act as the Commander in Chief and appoint ambassadors, they may also respectively investigate and fix rates, and declare blockades and dismiss executive employees. In the National Labor Relations Act of 1935, popularly called the Wagner Act, Congress bottomed the general federal labor relations policy upon its legislative powers under the commerce clause and also upon its sovereign powers over and within the District of Columbia and the territories of the United States;[2] the Labor Management Relations Act of 1947, popularly called the Taft-Hartley Act, continues in this vein, insofar as its Title I amends the Wagner Act, but in its other Titles we may see additional bases utilized. For example, under section 208 a federal district court may issue a "national health or safety" injunction which, even though coupled with the federal com-

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[1] There are other built-in limitations and exclusions in the 1947 Taft-Hartley re-adoption of the original 1935 Wagner Act, 61 STAT. 136, 29 U. S. C. §141 (1947) et seq., via the definitions and exclusions found in §152 and elsewhere. We do not discuss these phases of the Labor Board's jurisdiction.

Throughout this paper we refer to the Wagner and Taft-Hartley Acts. The amended former is found in full in Title I of the latter, and all citations below §100 refer to the amended Wagner Act. Above §100 the reference is to the Taft-Hartley Act.

[2] Found in Art. 1, §8, cls. 3 and 17, and Art. IV, §3, cl. 2, respectively. The Wagner Act, in §2(6), defined "commerce" so as to utilize its powers under all three of the cited clauses, e.g., "within" the District or any Territory.

merce power, may be termed an exercise of the federal police power;[3] to the extent that the Labor Board, under section 209(b), conducts a secret ballot of the employees of each employer involved in the dispute on the question whether they wish to accept the employer's final offer of settlement, the Board is acting as the amanuensis of Congress under such a police-power delegation.[4] Or, insofar as Congress controls the jurisdiction of the inferior federal courts, section 301(a) creates[5] a breach of contract cause of action and section 303(b) permits a federal district court suit for damage by any person injured because of a union's conduct which, independently termed an unfair labor practice under section 8(b)(4) of the amended Wagner Act, is now separately[6] made unlawful in section 303(a) unless the Labor Board has certified the union which may now justify; additionally, under section 305, Congress exercised its proprietary powers to prevent or punish strikes by its employees against itself, and in sections 302 and 304 utilized its sovereign powers as a government to make certain acts criminal.[7]

It is, however, solely with the commerce power in the delegation of congressional powers found in Title I that we are concerned, for the commerce power provides the base upon which the Board functions in its non-adjudicatory and adjudicatory capacities, i.e., in representation matters, in promulgating rules and regulations, etc., it acts in a quasi-executive or legislative manner, whereas in disposing of complaints it acts quasi-judicially. Has the Congress jurisdiction over all trade and commerce within the nation, and what jurisdiction has it delegated to the Board? Despite contentions to the contrary,[8] it is now judicially established

[3] For a discussion of these concepts see Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381, 452 (1919).

[4] In Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, (1952) the famous Steel Seizure Case, the President was held not to have independent and inherent executive powers, in times of peace, to seize private properties because of an impending strike, where Congress had provided other procedures, e.g., as described in text.

[5] This statutory suit is to be distinguished from the analogous common law suit for not alone are jurisdictional requirements different but the essential elements making up a cause of action are not the same. See Shirley-Herman Co. v. International Hod Carriers Union, 182 F. 2d 806 (2d Cir., 1950).

[6] The independent status of the two proceedings is discussed by Mr. Justice Douglas in International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U. S. 237 (1952).

[7] See also Algoma Plywood & Veneer Co. v. W.E.R.B., 336 U. S. 301, 311, (1949), referring to the War Labor Board's ruling during World War II that maintenance-of-membership clauses be included in collective bargaining agreements, This authority came not from the Wagner Act but "stems directly from the war powers of the United States Government." Quoted from Greenebaum Tanning Co., 10 War. Lab. Rep. 527, 534. See also note 175, *infra*.

[8] See, e.g., the most impressive arguments yet formulated, in I CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, chaps. II-IX (1953).

in theory that the national government may control interstate, and the local governments may control intrastate, commerce, with the former superseding and controlling the latter when, for example, any undue burden or obstruction upon interstate commerce results. This federal power, when exercised within its constitutional borders, was early termed a "plenary" one by Marshall,[9] and in the 1937 *Jones & Laughlin Steel Corp.* case, upholding the constitutionality of the Wagner Act, Chief Justice Hughes confirmed this approach in the field of labor relations but cautioned that "the scope of this [commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."[10] Two years later, in the *Fainblatt* case, Mr. Justice Stone correctly reaffirmed that the question of the degree of affectation was not applicable where interstate commerce was factually involved, for "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small," and he then concluded that "we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of [interstate] commerce affected more than that to which courts would apply the maxim de minimis."[11] There were, therefore, two aspects of an apparent lack of congressional power which constitutionally and judicially limited the delegated power which the Labor Board could exercise, namely, intrastate activities which had only an indirect and remote effect upon interstate commerce were not within the federal power, and even where interstate commerce was involved, or where the affectation doctrine did permit the exercise of the federal power, still when there was such a small and trifling amount of such commerce involved that the de minimis doctrine was to be applied, the federal jurisdiction was held not to attach.[12]

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[9] Gibbons v. Ogden, 5 U. S. (9 Wheat I) 562 (1824).

[10] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37 (1937). In the earlier Sick Chicken Case, for example, the Chief Justice had also warned that a distinction between direct and indirect effects upon interstate commerce had to be recognized, for if the latter, then "such [intrastate] transactions remain within the domain of the State power. . . . This principle has frequently been applied in [antitrust] litigation growing out of labor disputes." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546-547 (1935).

[11] N.L.R.B. v. Fainblatt, 306 U.S. 601, 606, 607 (1939). Justices McReynolds and Butler dissented, the former writing an opinion.

[12] The maxim is de minimis non curat lex, that is, the law does not concern itself about trifles, and its application to the original Wage and Hour Law is found in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 691-694 (1946), and to the amended (see note 18, infra) law in Frank v. Wilson & Co., 172 F. 2d 712 (7th Cir., 1949), *cert. den.* 337 U.S. 918 (1949). See, however, Mabee v. White

Both of these limitations are respectively applied and formulated judicially so that it is the courts which, ultimately, determine when the intrastate activity is too indirect or remote, or the interstate activity so trifling and picayune, as to be beneath federal jurisdiction and concern. These are necessarily fluid legal concepts which defy static application and therefore do "not satisfy those who seek for mathematical or rigid formulas."[13] How have these two judicial brakes upon congressional power been applied? The short answer is that they have been relegated to limbo, and yet such brusque treatment is not justified by events. The path along which the early indirect-remote and de minimis doctrines traveled, overturning legislative efforts to combat the Great Depression and to forestall any recurrence thereof, was itself shortly blocked by a new and far-reaching application of an old concept, namely, a federal police power under the commerce clause which might be utilized for purposes of economic control. Illustrative of this turn in judicial approach is the 1936 denunciation of the first, and the subsequent 1939 acceptance of the second, triple-A, as well as the great expansion in federal power which was approved under this latter statute; a further example is found in the language and approach in the 1941 approval of the Fair Labor Standards Act. The first triple-A sought to control agricultural production by the application of acreage quotas, using the taxing power for this purpose; denied judicial acquiescence in this method Congress turned to the commerce clause and was now upheld, the court pointing out that "The statute does not purport to control production. It sets no limit upon the acreage . . . . It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse."[14] In other words the product was "in" commerce when the federal power attached, but three years later a small-time farmer, producing 11.9 acres of wheat in excess of his quota of 11.1 acres, all to be consumed upon his farm and not a bushel physically entering the local or national market, was held subject to the act because he thereby withdrew his economic purchasing power from the national market and thus, in possible conjunction with thousands of others who might do the some thing, affected interstate

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Plains Publ. Co., Inc., 327 U. S. 178, 181 (1946), where the application of the doctrine was not permitted.

This legal de minimis doctrine is not to be confused with the administrative de minimis doctrine, discussed in subd. 3, for the legal doctrine ousts the Labor Board of all jurisdiction over the subject matter whereas the administrative doctrine begins with jurisdiction a legal fact and then proceeds, discretionarily, to refuse to accept jurisdiction for a variety of reasons.

[13] Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 467 (1938), stating also that "It is plain that the provision cannot be applied by a mere reference to percentages . . . ." See also Wickard v. Filburn, 317 U.S. 111, 123-124 (1942).

[14] Mulford v. Smith, 307 U.S. 38, 47 (1937). The first act was declared unconstitutional in United States v. Butler, 297 U.S. 1 (1936).

commerce.[15] Likewise in stamping its unanimous imprimatur upon the Wage and Hour Law, which controlled certain economic aspects of production, the court pointed out that it was the shipment of the manufactured goods in interstate commerce which was prohibited when produced under sub-standard conditions not the production itself, and that this was "indubitably" within the commerce reach of the federal government so that "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police powers of the states."[16] The statute, however, covered not alone employees "engaged in commerce" but also those engaged in "the production of goods for commerce," and this latter clause was upheld to the extent that it "includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."[17] To this federal power over producers whose interstate intent could thus be judicially measured was added a like control over employees of factory and office buildings in which the lessees were producing for or engaged in interstate commerce, where "the work of the employees in these cases had such a close and immediate tie with the process of production for commerce" that it was "an essential part of it,"[18] and the courts have held that the "Jurisdiction under the Labor Act is broader than jurisdiction under the Fair Labor Standards Act."[19] In other words, the federal reach is today not measured by any indirect-remote yardstick but by the question whether the activity, local or not, "exerts a substantial economic effect on interstate commerce . . . ."[20]

[15] Wickard v. Filburn, supra note 13, at pp. 127-128: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated is far from trivial," citing Fainblatt and Darby cases, supra note 11 and infra note 16, respectively. In N.L.R.B. v. Denver Bldg. & Constr. Trade Council, 341 U.S. 675, 683-684 (1951), the Labor Board was upheld in doing just this, where "The Board adopted its examiner's finding that any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State . . . ." See also note 21, infra, and the *Mabee* case, supra note 12, at p. 181, adopting the same approach for the Wage & Hour Law.

[16] United States v. Darby, 312 U.S. 100, 114 (1941).

[17] *Ibid.*, at p. 118.

[18] Kirschbaum v. Walling, 316 U.S. 517, 525-526 (1942). In the 1949 amendments to the F.L.S.A. the coverage of the statute was narrowed by including employees engaged in any "closely related" process or occupations "directly essential" to the production of goods for interstate commerce.

[19] N.L.R.B. v. Dixie Terminal Co., 210 F. 2d 538, 540 (6th Cir., 1954).

[20] Wickard v. Filburn, supra note 13, at p. 125. See also Howell Chevrolet Co. v. N.L.R.B., 346 U.S. 482, 484 (1953), "that Howell was 'an integral part' of General Motors' national system of distributors" and therefore within the Labor Board's jurisdiction.

On the above principles, then, the de minimis doctrine is also obsolete, for the maxim does not require the Board to refuse to take jurisdiction where "the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."[21]

The jurisdiction of the Labor Board, therefore, cannot extend beyond that possessed by Congress and, to the extent that earlier judicial views have been modified, it may be concluded that congressional power over intrastate activities is well-nigh omnipotent. There is, of course, judicial genuflection to the legal and political principles of a federal-state dichotomy but, to the degree that economic predilections today motivate the court, there is a studied acceptance of the legislative choice.[22] Thus, in discussing the power of Congress in the economic field of wages and hours, Frankfurter stated that "Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points. The real question is how the lines are to be drawn —what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the [judicial] variations" in deciding concrete cases.[23] Included in these larger[24] considerations which underlie con-

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[21] Polish National Alliance v. N.L.R.B. 322 U.S. 643, 648 (1944), quoted in the Denver Bldg. case, supra note 15, at p. 685, fn. 14. The conceptual opposition to this possible breach in our system of a dual form of economic control is cogently expressed by Cardozo in his concurring views in the Schechter case, supra note 10, at p. 554.

[22] See, e.g., the language in the *Wickard* case, supra note 13, at p. 129, and also the *Darby* case, supra note 16, at pp. 114-115. By analogy we may refer to the *Segregation Cases,* decided in 1954, which, in Chief Justice Warren's opinion for the unanimous bench (which reads like an essay in sociology), contains the statement that "In approaching this problem, we cannot turn the clock back to 1868 when the [14th] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." Brown v. Board of Education of Topeka, 347 U.S. 483, 492-493 (1954). Cf., however, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), and the subsequent bills in Congress, e.g., see N. Y. Times, July 29, 1955, on the vote in the house.

[23] The *Kirschbaum* case, supra note 18, at p. 523. The Justice was speaking of Congressional policy, not power, and the considerations influencing the exercise of that power and the judicial interpretation thereof, so that what he said is more pertinent to the statutory and discretionary aspects of jurisdiction, considered below, than here; however, to the extent that we can utilize the language for the instant purpose, it is adopted.

[24] The development of the federal powers over commerce, from its negative judicial use in the Gibbons case, supra note 9, to its first positive Congressional use in the I.C.C. Act of 1887, has been traced and briefly discussed by this writer in FORKOSCH TREATISE ON LABOR LAW §§204-206 (1953). This long-term develop-

gressional power over commerce, interstate and intrastate, and which filter down to Labor Board fixing of jurisdictional policy, are not alone the facts of an economic depression and the concomitant necessity of drastic experimentation via increased federal power,[25] but also, e.g., the facts of a shooting war in the early 1940's, a national effort to prevent a post-war collapse, the Korean emergency, the cold war vis-a-vis Russia, and the future atomic era; opposed to the increase in national control are such facts as the political veering toward a more central course,[26] the federal withdrawal from the market place,[27] the greater degree of economic control turned back to the states,[28] the Hoover Commission's report on business enterprises,[29] and the possible future lessening in world tensions. If this overall approach be condemned because of its accordion-like nature then a counter is found in the due process dispute raging in the Supreme Court over the content of that clause, or it may be asked whether the Justices are economic and political virgins or legal cadavers, enshrined or entombed far from the madding crowd's ignoble strife.

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ment is not considered here, so that it is the expansion and contraction of the federal power in these past two decades of which we speak.

[25] See, e.g., Steward Machine Co. v. Davis, 301 U.S. 548, 586 (1937), upholding the Social Security Act's unemployment features, Cardozo writing that "The fact quickly developed that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve."

[26] This trend cuts across party lines and the 1952 split in the Democratic Party need not be gone into except to mention that, on May 23, 1955, Senator George of Georgia, upon the Senate floor, inveighed against a provision in a highway bill which would have empowered the federal government to control advertising rights along a 550 foot strip of land on either side of the proposed highways. "Throughout this whole bill is a decided trend toward federalization of whatever the Federal Government touches," said the Senator, and the Senate unanimously removed the advertising provision. New York Times, May 24, 1955, p. 21, col. 1.

[27] E.g., the increased use of private concerns and suppliers for federal requirements to the exclusion of federal agencies formerly so doing, as in the Dixon-Yates contract with the A.E.C. for the building of a plant to supply electrical energy. (Subsequently terminated)

[28] E.g., the Submerged Lands Act of 1953, 67 STAT. 29 (1953), 43 U.S.C. §1301 et seq., returning to the coastal states the underwater oil lands off their shores, within a three-mile limit, after the Supreme Court had upheld the federal government's right thereto. See citations to original holdings and discussions of other aspects in Alabama v. Texas, 347 U.S. 272 (1954). See also the efforts, by legislation, of the natural gas states to obtain control of such gas wells within their states, despite Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), and Panhandle Eastern Pipe Line Co., 347 U.S. 157 (1954).

[29] May, 1955, stating, at pp. 1 and 3, that the federal government's "commercial—and industrial-type facilities within the Department of Defense . . . probably exceeds 2,500," and that "Probably about 1,000 industrial facilities could be eliminated without injury to our national defense or any essential governmental function." At p. 45 the Report began its analysis of government-owned business enterprises of the civilian agencies, and stated that "Many of these publicly

2.) THE STATUTORY JURISDICTION OF THE LABOR BOARD AND THE FEDERAL-STATE CONFLICT

a.) Its delegated jurisdiction.

The possession by Congress of a broad scope of power under the commerce clause permits that body to do, or delegate to others to do, much within this area. The commerce power, however, is a "concurrent" one, i.e., usually both federal and state jurisdictions may lay hold of the trade and commerce involved,[31] subject to the former's supremacy as herein discussed. Congress, however, has created not one agency and vested it with all of such constitutional powers but, rather, has set up numerous commissions and boards and thereby parceled out much of these powers. For example, the Interstate Commerce Commission has jurisdiction, in the field of interstate commerce, over not alone railroad rates but also trucks, water carriers, some pipelines, etc.; the Federal Trade Commission deals with unfair trade practices, the prevention of monopolies before they utilize their power, etc.; the Wage and Hour and Public Contracts Divisions handle the wage and hour and other provisions under the F.L.S.A. and Walsh-Healey Acts; the National Mediation Board has jurisdiction of railroad and air carriers insofar as the determination of bargaining representatives is concerned, analogous to the powers of the Labor Relations Board in the general area of labor relations; etc. It is therefore a question of what congressional powers have been particularly delegated in a national field and, through judicial exegesis, the delegatee's powers are additionally determined and even circumscribed, i.e., it is not only Congress which limits the agency's jurisdiction by statute but also the judiciary, through its powers of interpretation.[32] While there may therefore be a narrow legislative grant and a cautious legislative and judicial delimiting of powers and jurisdiction, yet, within this delegated field, the Labor Board is supreme. Thus, in its First Annual Report, this agency stated that its "jurisdiction is coextensive with congressional power to legislate under the commerce

owned enterprises compete with private business; and a few enjoy a monopoly position since private enterprise in effect has been excluded from the field. There exists no definitive list of these publicly owned enterprises."

[30] See, e.g., Secs. 28-34, and 192-194, the author's forthcoming text in Administrative Law, to be published, January 1956, by The Bobbs-Merrill Co., Indianapolis.

[31] See, e.g., Algoma Plywood & Veneer Co. v. W.E.R.B., 336 U. S. 301, 315 (1949), for merely one illustration of judicial use of this concept, and also Grant, *The Nature and Scope of Concurrent Power,* 34 COLUM. L. REV. 995 (1934).

[32] See also note 60, infra. Of course the judiciary may expand or permit the agency to expand the delegated jurisdiction so as to include persons or items not desired to be granted, whereupon Congress may or may not accept, e.g., in N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944), newsboys were held employees of papers but Congress, in the 1947 amendments, and in its committee reports, indicated a contrary desire, whereupon the courts, N.L.R.B. v. Steinberg, 182 F. 2d 850 (5th Cir., 1950), and the Labor Board, In re Hearst Consolidated Publications, 83 N.L.R.B. 41 (1949), followed suit.

clause of the constitution,"[33] and the Supreme Court, in upholding the law, felt that the grant to the Board in section 10(a), to prevent any person from engaging in any unfair labor practice "affecting commerce," as the broad term was defined in section 2(6-7), stemmed from a plenary power.[34] The Board was therefore upheld in asserting jurisdiction where less than .001% of an employer's sales were in interstate commerce,[35] and the act was held "applicable to a processor, who constitutes even a relatively small percentage of his industry's capacity,"[36] the court reasoning that many drops of water eventually make a river so that, as already discussed, catching one such drop in a labor dispute, if repeated for other drops, eventually make a river so that, as already discussed, catching one such drop in a labor dispute, if repeated for other drops, eventually would dry the stream.[37] The jurisdiction of the Labor Board in the entire field of labor relations is therefore not as broad in scope as the over-all commerce power of Congress but, within the limited field of the delegation actually made, the Board's jurisdiction and powers are coextensive with and similar to the (commerce) powers Congress might exercise directly if it legislated specifically.[38]

What powers have been actually delegated to the Labor Relations Board by the Congress? The basic statute today is the amended Wagner Act but, as we have seen, the Taft-Hartley Act itself, in Title II for example, requires the Board to assume other duties under specified conditions. We are concerned solely with the Board's current jurisdiction and powers under the Wagner Act which, in effect, gives the agency jurisdiction under the commerce clause over a segment of the nation's economic life, and also grants nonjudicial (i.e., administrative) and judicial powers to act within that jurisdiction. These terms, jurisdiction and power, are not synonymous, e.g., a government may always have jurisdiction and power but need not exercise the latter except when

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[33] Annual report (1936) p. 135. See also note 19, supra.

[34] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). The amended Act continues the terms and definitions verbatim.

[35] N.L.R.B. v. Schmidt Baking Co., 122 F. 2d 162 (4th Cir., 1941).

[36] N.L.R.B. v. Bradford Dyeing Ass'n., 310 U.S. 318, 326 (1940); the amount was roughly 1%, although in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the Sherman Act was held inapplicable in a labor situation to a corporation, 80% of whose product was shipped interstate, because this 80% constituted less than 3% of the total value of the industry's entire output, a strong dissenting minority feeling that by analogy to the Wagner Act there was jurisdiction under the Sherman Act. The majority's reasoning was based upon the congressional desire to strike only at unreasonable restraints.

[37] See notes 12, 15, and 21, supra, and also N.L.R.B. v. Suburban Lumber Co., 121 F. 2d 829 (3rd Cir., 1941), *cert. den.* 314 U. S. 693 (1941).

[38] See, e.g., the language in Amalgamated Ass'n. of Street, Electric Ry. & Motor Coach Employees v. W.E.R.B., 340 U.S. 383, 391 (1951): "Congress . . . saw fit to regulate labor relations to the full extent of its constitutional power under the Commerce Clause . . . ."

required or desired,[39] so that an agency may have been granted a broad or a narrow jurisdiction and, within that granted jurisdiction, its delegated powers may likewise be broad or narrow.[40] Put differently, the Board has as its goal the effectuation of the congressional desire to prevent obstructions to interstate commerce by upholding those general rights found in section 7, namely, the right of employees to, or to refrain from, self-organization and collective bargaining through their own representatives, but its jurisdiction extends only to those persons not excluded or exempted by the definitions in section 2, and does not touch the federal or state governments or their agencies or subdivisions, etc.; within this area of its granted jurisdiction the Board has been "empowered" (section 10[a]) to prevent unfair labor practices, and authorized to "decide" (section 9[b]) the appropriate unit, to "investigate" petitions for elections, to "direct" elections, and to "certify" the results thereof.[41] To what extent are those grants and delegations of jurisdiction and power to be exercised solely and exclusively by the federal Board and no others, federal or state, and to what degree is it obligatory upon that Board to act within its jurisdiction and powers? The first question is of present concern while the second is later treated under the Board's discretionary exercise of its powers (subd. 3).

b.) Its supremacy in a direct conflict and its ability to preempt.

In an area of dual sovereignty conflict is a necessary concomitant and, even within a unitary form of government, questions of jurisdiction among delegatees are ever present. The Labor Board's jurisdiction, within the federal sphere of authority, has been carefully carved out so that, on paper, no jurisdictional conflicts with other federal agencies need arise; any error in draftsmanship can be congressionally corrected so that no such possible internal federal difficulties over inter-agency jurisdiction ordinarily need continue. Here the national legislature has power under the constitution and is distributing this power as it sees fit, subject only to other constitutional limitations and requirements, e.g., acceptable standards so as to prevent delegations from running riot.[42] When the jurisdiction of a state or its agency, however, directly and irrevocably collides with that of the Congress or its delegatee, then a judicial refereeing under constitutional rules is necessitated, and it is this federal-state conflict

[39] E.g., the approach is found in Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 425 (1934), where Hughes wrote that "While emergency does not create power, emergency may furnish the occasion for the exercise of power."

[40] While the Labor Board has a limited jurisdiction in the entire field of employer-employee relations, within its delegated area of labor relations it has received all of the powers of Congress, thus encompassing quasi legislative, executive, and judicial powers.

[41] §9(c)(1). Other powers of course, have been delegated, e.g., to issue subpenas, §11(1), to apply for temporary injunctions, §10(j), or enforcement orders, §10(e), but we are concerned primarily with the quoted ones.

[42] The phrase is in Schechter Poultry Corp. v. United States, supra note 10, at p. 553.

which requires examination so that the federal Board's jurisdiction be determined. We start, at the outset, with the supremacy clause found in Art. VI of the Constitution which, applicable to any such outright conflict, denounces local action. Past judicial inquiry has been primarily concerned with the directness of the conflict, voiding state action when it so impinges upon the federal effort that the latter is negated, impaired, or even deflected,[43] and also proscribing completely any state action, even when the federal government itself has not acted, where the subject matter is national in scope and requires uniform legislation.[44] There also developed a preemption or interstices doctrine, the former being an active and the latter a passive concept of federal action; the theory is that the states may act in a concededly federal area which has not been taken over by the federal government, and even when the latter does act, the states may act or continue to act to the extent that Congress has not declared a policy or has not legislated upon any portion of the subject matter, i.e., the states may act upon interstate commerce within the cracks left open by the federal policy or law.[45] This last doctrine is a judicial one, not a Labor Board policy, and is at the nub of present-day difficulties between the federal Act on the one hand, and like state acts, agencies, and courts on the other. The approach to this judicial doctrine begins with the admitted constitutional power of Congress over interstate commerce to its actual exercise in the statute creating the Labor Board and endowing it with powers; the national legislature has jurisdiction and plenary power in this field, but what did it intend by its statute? This intent is, in situations such as these, the key to the problem, and the problem concerns itself with Labor Board jurisdiction, not powers, as we have dis-

[43] Kelly v. Washington, 302 U.S. 1, 10 (1937), stating that the local act "is superseded [by the federal] only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" See also Hill v. Florida, 325 U.S. 538, 539, 543 (1945), denouncing a state requirement that union business agents be licensed because an "irreconcilable conflict" between the federal and state acts occurred, and quoting from Union Brokerage Co. v. Jensen, 322 U.S. 202, 207 (1944), that the federal statute controls when the two acts cannot "move freely within the orbit of their respective purposes without infringing upon one another."

[44] See, e.g., the language in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851), and also Leisy v. Hardin, 135 U.S. 100 (1890), P.U.C. v. Attleboro Steam & Elec. Co., 273 U. S. 83 (1927), U.S. v. P.U.C. of Calif., 345 U.S. 295, 304 (1953). In this last case the court made reference to "those few unique federal statutes" which, in such a field, nevertheless permitted states to act.

[45] In Quaker Oats Co. v. City of New York, 295 N.Y. 527, 68 N.E. 2d 593, 595 (1946), the court of appeals said that "even if the Federal government has legislated in a particular field, local regulation in that field is not necessarily prohibited unless national uniformity is essential. The State or municipal statute will be striken only if—in terms or in practical administration—it conflicts with the Federal law or infringes on its policy." The federal government may preempt completely or piece-meal, i.e., it may, by successive laws, narrow or blot out one or more of the cracks it left.

tinguished them above, as well as with the intent of the Congress that such jurisdiction be or not be, in whole or in part, exclusive.

c.) The negativing of state action under the federal statute does not automatically result in Labor Board jurisdiction.

Exactly what is the jurisdiction of the Labor Board? This is a positive concept, for the basic statute found in Title I of the Taft-Hartley Act gives us this information, and the decisions of the judiciary interpret the language where required. To the extent here required this granted jurisdiction has already been given and, in the discussion which follows, is elaborated upon. However, and for the development and understanding of the federal-state conflict, there must be mentioned a negative concept as well, i.e., the congressional policy and intent to have some degree of labor-management uniformity in interstate commerce. This latter approach prevents state action, although not necessarily requiring or permitting federal action, and in effect does or may create a no-man's land in interstate commerce, the federal Board may not have been granted jurisdiction, and the states being denied jurisdiction or power to act.[46] This negative concept may be illustrated by *Hill v. Florida*,[47] where the state enjoined Hill, a business agent, and his union employer, from so functioning until a state license had been obtained; in denouncing the act which prevented defendants from operating within the state until the conditions required for the issuance of a license had been fulfilled, the Supreme Court majority referred no less than five times in three paragraphs to the "full freedom" of choosing their own bargaining representative which the Wagner Act envisioned. This term is found in section 1, the policy section, which declares it to be federal policy to eliminate obstructions to interstate commerce by, among other things, "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." This, said Mr. Justice Black, "means freedom to pass upon that agent's qualifications," and the Florida statute, by limiting a union's choice of its agent or bargaining representative, "substitutes Florida's judgment for the workers' judgment," thereby shrinking the full freedom "to a greatly limited freedom" so that the local act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[48]

If this statute were to be upheld, continued the Justice, then employers could defend a refusal-to-bargain complaint before the Board on such ground, although where this had occurred the Board had "properly rejected" the defense because "Congress did not intend to subject the

[46] This no-man's land is not the same as the Board's accordion policy developed in subd. 3, infra, for there the Board has jurisdiction, which it refuses to exercise, whereas here it has no jurisdiction even if it desired to act.

[47] *Supra* note 43.

[48] *Ibid.*, at pp. 541 and 542, the last quotation being adopted from Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.' "[49] Chief Justice Stone agreed that one portion (section 4) of the Florida act conflicted with the Wagner Act, but felt that the latter's section 7, rather than its section 1, was the source of the conflict, section 7 granting employees "the right . . . to bargain collectively through representatives of their own choosing;" he disagreed, however, in the denunciation of another portion of the state's law (section 6), because the innocuous requirements there were "not incompatible with the National Labor Relations Act, since it in no way hinders or interferes with the performance of the union's functions under that Act."[50] Mr. Justice Frankfurter dissented (Roberts concurring in the dissent) because the state had power to act as it did and because "Congress has neither expressly nor by fair inference forbidden Florida to deal with the matter with which Florida has dealt and Congress has not." His lengthy opinion concluded with the view that congressional legislative efforts were designed to wipe out the unfair labor practices of employers in fighting their employees' efforts to organize, and that "All other aspects of industrial relations were left untouched by the Wagner Act, and purposely so . . . . When Congress purposely dealt only with the employer aspect of industrial relations and purposely abstained from making any rules touching union activities, the internal affairs of unions, or the responsibility of union officials to union members and to the public, Congress certainly did not sponge out the States' police power as to these matters."[51] It will be noticed that Black (and the majority) pegged his approach on the opening policy section of the Act, whereas Stone secured his to the provisions of the Act itself; the latter therefore narrowed the base from which local statutes could be denounced and thus felt that section 6 of the local statute did not conflict with the federal mandate, as distinguished from its policy. To Frankfurter, there was no provision, no policy, and therefore no intent that Congress desired to overthrow state efforts in these respects. All of these Justices had previously agreed with Douglas, in the *Allen-Bradley* case, that a state "conflict with the policy or mandate of the federal Act" was not shown where a state labor board held a union guilty of unfair labor practices in mass picketing, threats, obstructions, picketing the homes of employees, and like conduct, for no federal intention to oust

[49] 325 U. S. at p. 542, referring to and quoting from In re Eppinger & Russell Co., 56 N.L.R.B. 1259, 1260 (1944). There the Board's trial examiner had rejected the employer's contention and on similar grounds, at p. 1266. See also N.L.R.B. v. Hearst Publ., Inc., 322 U. S. 111, 122-123 (1944), holding that the definition of "employees" in the Wagner Act was not to follow the common law whims of the various states, thereby resulting in a "patchwork plan for securing" workers' rights under the federal statute, for "The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale."

[50] 325 U.S. at p. 546 (1945).

[51] *Ibid.*, at pp. 547 and 559 respectively.

states of their police power in such a situation was disclosed by the federal act.[52] However, whereas Douglas had previously used both terms, i.e., policy and mandate, to show no opposition (although the disjunctive "or" was inserted), Black and Stone now disagreed as to the use of policy alone as the basis for denunciation (with Douglas siding with Black), with Frankfurter using both policy and mandate to show no opposition.[53]

This negativing of all state action, whether by labor boards, courts, or administrative licensors, and even when allegedly based upon reasons other than labor relations, is thus not dependent upon identical federal action; so long as such a federal policy or intent to protect certain conduct is apparent, states cannot control this area of activity.[54] This does not mean that ipso facto the Labor Board is authorized to assume control, for its own jurisdiction is separately to be analyzed and discussed. In both the *Hill* and *Allen-Bradley* cases the federal Board was definitely held not to have the interstate jurisdiction or power which the states had utilized, so that from the *Hill* case there resulted an area of union and individual interstate conduct which could not be regulated by the states and had not been regulated by the nation.

This particular no-man's land, however, was not long vacant for, two years after *Hill v. Florida*[55] was decided, the Taft-Hartley amendments somewhat entered the overall field and required unions to file financial and organizational reports, publicize the former among their members, have officers file non-Communist affidavits, etc.[56] A mandate

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[52] Allen-Bradley Local No. 1111, etc. v. W.E.R.B., 315 U.S. 740, 750 (1942). This was an unanimous decision, the opinion also stating: "But, as we have said, the Federal Act does not govern employee or union activity of the type here enjoined. And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy. If the order of the state Board affected the status of the employees or if it caused a fortfeiture of collective bargaining rights a distinctively different question would arise. . . . Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together," the state action was to be upheld. Ibid., at pp. 750-751.

[53] See also note 90, infra, for a comment on this disagreement. To this writer no either-or disjunctive appears; both mandate and policy are to be utilized, except that mandate is superior as a source for the ascertainment of intent.

[54] See e.g., Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 487 (1955): "Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations."

[55] 325 U.S. 538 (1945).

[56] These requests are found in §§9 (f-h) of the amended Act. For discussions, see FORKOSCH, TREATISE ON LABOR LAW, §§125-137 (1953), and also *Internal Affairs of Unions: Government Control or Self-Regulation?*, 18 U. CHI. L. REV. 729 (1951).

was thus added to the policy, although the mandate was of a negative nature, i.e., the compulsion upon unions was enforced by denying access to the Board processes. There was and is, nevertheless, affirmative federal legislation in this area, and so the question arises whether all state action in the field of interstate commerce, involving similar or analogous required union conduct, is proscribed. Since Congressional intent is of importance the answer must be sought outside the statute for the law contains no superficial clue as to the specific federal desire for preemption. Since there is no particular and specific aid found elsewhere, we conclude that the federal law does not forbid all local action in this area, and this conclusion involves a process of rationalization based upon: the unanimous judicial approach in the *Allen-Bradley* case, that a state's police power is still effective in particular aspects of an area, not covered by federal law, even though the latter has acted upon other aspects within that same area; a prior judicial upholding of a state law which required interstate ticket brokers or agents who arranged for interstate motor travel of passengers to be licensed and bonded;[57] the identical approach of Stone and Frankfurter in the *Hill* case, i.e., a state may exercise its police powers to punish and control local fraud, violence, etc. even though interstate commerce was involved, where Congress has not specifically umbrella-ed or blanketed the conduct and no constitutional limitation is involved or undue burden on national commerce results; and the later decisions of the Supreme Court, treated below. Thus, even though states may not regulate unions

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See also the Board's rulings in Plaster Tenders, Construction, General & Shipyard Laborers' Local Union No. 802, 111 N.L.R.B. No. 104 (1955), and National Union of Marine Cooks & Stewards, 111 N.L.R.B. No. 129 (1955), holding that a union which had failed to distribute copies of its financial reports to its members was not in compliance and could not avail itself of the Board's processes; this Board inquiry into compliance status is to be contrasted with the inability of the Board to inquire into the truth or falsity of the non-Communist affidavits, Farmer v. United Electrical, Radio & Machine Workers of America, 211 F. 2d 36 (App. D. C. 1953), *cert. den.* 347 U.S. 943 (1954), International Fur & Leather Workers Union v. Farmer, 117 F. Supp. 35 (D.C.D.C. 1953), although In re Maurice E. Travis, Sec'y.-Treas., Int'l. Union of Mine, Mill & Smelter Workers, 111 N.L.R.B. No. 71 (1955), the official publicly announced his affidavit was false whereupon the Board found the union and its affiliates to be out of compliance.

[57] California v. Thompson, 313 U.S. 109 (1941). There Congress had not sought to regulate such agents but had excluded these irregular motor vehicle carriers from the Motor Carrier Act of 1935. The Supreme Court felt that no undue burden on interstate commerce resulted, no constitutional limitation upon state action was present, and that local concern over the fraudulent practices of such ticket agents was sufficient, under the police power, to support the $1 license fee and the filing of a $1,000 bond, failing to obtain these resulting in a misdemeanor conviction. Said the court: "The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it. . . . For here the regulation is applied to one who is not himself engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier." At pp. 114-115.

or business agents, where questions of the character and fitness of the agents are at issue, so as to impair the rights of employees to organize and bargain freely, evils which arise from the conduct and actions of these representatives may, under a state's police powers, still be regulated and punished.[58]

d.) The positive jurisdiction of the Labor Board: negating state action.

The positive jurisdiction of the Labor Board is also a source of the federal-state antinomy we have just examined, although now the scope of the conflict is narrowed. For example, in analyzing the negative concept of Congressional policy and intent we saw that, in *Hill v. Florida*, Black and Stone had disagreed on the use of policy as a basis for denouncing state action, the latter preferring the mandated specifics to the preamble's generalities. It is still Congressional intent, however, which is the touchstone of the conflict, as a federal plenary power is involved which, as we have seen, can sweep clean the interstate area of all regulation, federal or state, or permit only federal or only state, or any combination desired. For example, the Congressional intent may be to reject any state regulation, even though it does not itself regulate,[59] or it may desire solely federal regulation, even though only partial in scope,[60] thereby preventing any state action,[61] or it may permit state regulation even though it does not itself regulate,[62] or it may itself regulate, to an extent,

[58] E.g., in Taft-Hartley §302(c)(5) we find the federal requirements concerning trust funds for pensions, etc., in some detail, and under subd. (d) a violation is made a misdemeanor punishable by a $10,000 fine or prison term for one year or both. Does this affirmative federal regulation oust the states of all power to affect or touch this identical conduct? Put differently, does the federal legislation render ineffective state criminal laws, etc.? The answer is no, and if it were otherwise then most of the local investigations into the abuses of pension trust funds by their trustees would go for naught, and legislation on the books would be a hollow mockery.

[59] In the *Cooley* case, supra note 44, and infra note 62, the dissenting Justices predicated their disagreement upon the lack of any state power to regulate interstate commerce, although agreeing that Congress might adopt such a state law and thereby legitimatize it; the concurring Justice felt "that this is an original and inherent power in the States . . . ." 53 U.S. (12 How.) 299, 319 (1851).

[60] See the analysis and discussion, with numerous citations, in Kirschbaum v. Walling, 316 U.S. 517, 520-21 (1942), stating, inter alia, "Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law."

[61] See, e.g., Napier v. Atlantic Coast Line Ry. Co., 272 U.S. 605 (1926), Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57, 60-61 (1934): "So far as the safety equipment of such vehicles is concerned, these [federal] acts operate to exclude state regulation whether consistent, complimentary, additional or otherwise." See also the *Bethlehhem Steel* case, infra note 65, at p. 773.

[62] In the *Cooley* case, supra note 44, at p. 320, the national legislature had specifically said, in a 1789 statute, that pilots "shall continue to be regulated in conformity with the existing laws of the states . . . until further legislative provision shall be made by Congress." In upholding a Pennsylvania statute the majority held "that the mere grant to Congress of the power to regulate com-

and simultaneously permit state regulation to some additional extent or to the balance not federally regulated.[63] In the narrow field of interstate labor-management relations Congress has set forth, in the amended Wagner Act, a series of positive jurisdictional bases upon which the Labor Board is to act and to effectuate the legislative desires; has Congress thereby intended that all state regulation be prevented, or that some be permitted and some prevented, or that all state regulation be permitted except when it conflicts with this federal legislation (or the policy expressed in it)?[64] The judicial approach in this mandated area is the same as in the overall policy area, namely, to strike down state action only when the federal statute (or its policy) requires it. In other words, states are not bereft of all power to act but may act until and except where the federal intent is to the contrary. The outstanding pre-Taft-Hartley judicial expression of this view is the *Bethlehem Steel* representation (not unfair labor practice) case,[65] decided one month after the Supreme Court had upheld a Board determination that foremen were protected by the federal statute,[66] and in which, despite the existence of agreements between the two Boards concerning a division of jurisdiction, the Court denounced the local Board's recognition of foremen at a time when the national Board had refused to approve foremen's units. The facts disclosed a vacillating Labor Board policy as to this group of men, first recognizing, then "for policy reasons but without renouncing jurisdiction," rejecting, and finally again recognizing them as entitled to organize and bargain

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merce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states."

[63] See also Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915): "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived . . . . When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. . . . The legislation is not saved by calling it an exercise of the police power . . . ."

[64] The policy in §1 of the Act, previously examined, is general policy permeating the entire statute and forming a broad base upon which it rests; the particular policy here involved is narrowed to the concept(s) underlying the actual section(s) discussed and seeks to effectuate this, and not another, portion of the law.

[65] Bethlehem Steel Co. v. N. Y. State Labor Relations Board, 330 U. S. 767 (1947). A former Chairman, Keith Lorenz, felt that all federal-state difficulties stemmed from this case, *Conflict of Jurisdiction Between National and New York State Labor Relations Boards,* 5 IND. & LAB. REL. REV. 411, 412-13 (1952).

[66] Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1947), a bare majority holding foremen were within the definition of "employee" in §2(3) of the Wagner Act. The law has been changed by the Taft-Hartley amendments and this is shortly discussed.

under the statute's protection;[67] during the second, i.e., non-recognition, period the state Board took jurisdiction and the employers appealed; the Supreme Court now decided that both laws could not stand together and that the local must yield to the national. Wrote Mr. Justice Jackson for the majority of six:

> Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter. . . . They might come out with the same determination, or they might come out with conflicting ones as they have in the past. . . . If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. . . . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. . . . We do not believe this leaves room for the operation of the state authority asserted.[68]

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[67] The *Bethlehem* opinion merely noted (at p. 770) this shifting policy, citing Board decisions, without giving reasons. In the H. R. REP. No. 245, 80th Cong., 1st Sess. (1947) to accompany H. R. 3020, at pp. 13-14, these changing views were commented upon, the Report noting that the Board's original views supporting recognition having resulted in the introduction "in Congress [of] a bill taking foremen out of the Labor Act (H.R. 2239, 78th Cong.). While the bill was pending in the Military Affairs Committee of the House, the Board, on May 10, 1943 . . . reversed itself . . . The Military Affairs Committee then dropped H.R. 2239 . . . Then . . . the Board changed its mind again," in the *Packard* case, and "As a result . . . both Houses of Congress, by overwhelming majorities, passed the so-called Case bill, exempting supervisors from the operation of the Labor Act. The President vetoed the bill, and the Board continued to unionize foremen at an accelerated pace."

From the above it would appear that the Board's 1943 reversal was actuated solely by the legislative club wielded by Congress. However, one additional factor should be set forth, namely, that the original views of the Board had been by a 2 to 1 vote (Millis and Leiserson versus Reilly), and the 1943 reversal had been preceded by a change in Board composition, the new Member (Houston replacing Leiserson) first voting with the original dissenter, thereby producing the 1943 reversal, and two years later changing his views and voting with the original supporter (Millis) of supervisor protection. Of course we may now venture into the reasons why Houston acted in this fashion, but conjecture ventures far enough to this point.

[68] 330 U. S. at pp. 775-76. See also the discussion of rate making in Southern Ry. Co. v. Reid, 222 U.S. 424, 442 (1912): "If the [federal] regulation be not exclusive, this situation is presented: If the carrier obey the state law,

In the *Bethlehem Steel* case the original Wagner Act did not expressly cover supervisors so that a question of legislative intent and also judicial interpretation might have permitted temporary state action; but, once the judiciary upheld the Board's jurisdiction, and the agency did exercise its powers so as to support, denounce, or rule that no regulation of supervisors was to occur, any and all state action not alone was to be circumscribed and emasculated but had to cease.[69] The national legislature could, of course, correct this misinterpretation and misapplication of its intent and, in the 1947 amendments, did so, by excluding from the definition of "employee" any supervisor (section 2[3]), and now defining this term (section 2[11]);[70] additionally, in new section 14(a), while permitting supervisors to become or remain members of a union, Congress expressly said that employers "subject to" the federal Act were not to be compelled to deem them "as employees for the purpose of any law, either national or local, relating to collective bargaining," so that employers are "free in the future to discharge supervisors for joining a

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he incurs the penalties of the federal law; if he obey the federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it appears the others must be silent. We can see no middle ground." See also the same concept expressed in Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U.S. 485, 499 (1953).

[69] At pp. 774-5 of 330 U.S. the majority pointed out that a state's police powers might be upheld during an hiatus in federal action but "the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of statute. . . . It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the latter class." The trouble was that it was not at all clear that such Board failure to exercise its authority was a "ruling," especially in view of the negotiations between the two boards, for the federal representatives were hestitant about an unequivocal assertion of federal supremacy and a denunciation of state action. See 330 U.S. at pp. 793-4. The legal principle, however, is clear, albeit the administrative effectuation was inept. Unquestionably the judiciary here indulged in a bit of post hoc, ergo propter hoc reasoning, but this is here immaterial.

[70] "Supervisor" is a generic term, legally, and includes not alone foremen but others who fit the statutory definition. The Labor Board, subject to judicial review, may therefore initially determine whether the facts in each case fit the congressionally desired exclusion. See, e.g., discussions and citations in N.L.R.B. v. Leland-Gifford Co., 200 F. 2d 620 (1st Cir., 1952); Ohio Power Co. v. N.L.R.B., 176 F. 2d 385 (6th Cir., 1949), *cert. den.* 338 U.S. 899 (1949). (In the latter case the Board's interpretation and application to the facts were rejected, and numerous Board cases, not here discussed, have taken up variations and questions of degree.) But even where an admitted supervisor is discharged the Board may still find it an unfair labor practice when "it constituted an invasion of the self-organizational rights of rank-and-file employees," i.e., following upon the heels of the union's victory in the election, it "plainly demonstrated to rank-and-file employees that this action was part of its [the employer's] plan to thwart their self-organizational activities" and thereby created a fear among these employees of like treatment for continued support of the union. Talladega Cotton Factory, 106 N.L.R.B. 295, 297 (1953).

union, and to interfere with their union activities."[71] The jurisdiction of the Labor Board is thus not alone limited but, in express terms, the possibility of state action is removed; there can thus be no federal-state conflict over this particular employer-employee relation in the narrow area of collective bargaining where the employer is subject to the federal power over inter-state commerce, and various corollaries flow and questions arise (not here examined). For example, do the other definition-exemptions in the federal Act ipso facto reject state jurisdiction or, since supervisors are the only such exclusion so expressly treated in new section 14(a), has Congress thereby expressed an intent that the states may take hold of the other exclusions, e.g., agricultural laborers, domestics, independent contractors?[72] Or is it federal policy, as distinguished from mandate, to prevent state jurisdiction of these subjects? Is the Supreme Court's interpretation of such policy and mandate to continue as heretofore, with specific treatment via statutory language and policy expressions to be merely one or more factors, among others, which are to be taken into judicial considerations? Has this Congressional reversal determined that hereafter no state may act within the ambit of the Taft-Hartley Act?

Before examining this question it is advisable to differentiate between "exclusive" and "primary" jurisdiction. The former implies that no other power can act upon the subject or within the particular field involved, so that if the Labor Board has such jurisdiction then, even if it desired, no state agency or court would be able to act. Congressional intent, as we have seen, determines this (and it may also determine that no power, federal or state, be able to act). Primary jurisdiction, however, does not automatically oust others from any and all power to act but implies, instead, that the Labor Board is the first agency to make any initial determination; or, at least, that it should have the power to do so. If the Board may exercise discretion as to whether to exercise this power, then

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[71] N.L.R.B. v. Edward G. Budd Mfg. Co., 169 F. 2d 571, 579 (6th Cir., 1948), *cert. den.* 335 U.S. 908 (1948), upholding the constitutionality of these various provisions against equal protection and due process charges.

[72] The federal exemptions are more inclusive than these illustrations, encompassing government (federal and state) and governmental agencies, with various state acts following suit by law or interpretation, and even broadening the exemptions, employees subject to the Railway Labor Act, with the states, generally doing likewise, etc. For illustration of judicial discussions and interpretations involving hospital, education, and charitable institutions, see St. Luke's Hospital v. Labor Relations Commission, 320 Mass. 467, 70 N.E. 2d 10 (1946); Columbia University v. Herzog, 295 N.Y. 605, 64 N.E. 2d 351 (1945); In re Salvation Army, 349 Pa. 105, 36 A. 2d 479 (1949).

A somewhat parallel analysis to that concerning supervisors may be drawn in the case of independent contractors. In N.L.R.B. v. Hearst Publ., Inc., 322 U.S. 111 (1944), newsboys were held to be employees but the House, in its Report, supra note 67, at p. 18, disclosed the 1947 amendments were designed to correct this decision, and the Labor Board accordingly so held in Hearst Consolidated Publ., 83 N.L.R.B. 41 (1949).

another question of Congressional intent enters: Did Congress intend that if the Board rejected such an opportunity to act, that the states be next in line? This last question is examined in subd. 3, below, whereas we now examine the exclusive jurisdiction of the Board; in later subsections g and h we examine the primary jurisdiction of the Board.

To stay within the supervisory field just discussed, the Labor Board has remarked that while "the Act no longer protects supervisors discharged for union activities, . . . the amendments did not change the law heretofore applied in cases . . . where the discharge of supervisory employees constituted an invasion of the self-organizational rights of rank-and-file employees."[73] More important, for us, is the question whether the new law prevents states from compelling employers to deem supervisors "as employees for the purpose of any law, either national or local, relating to collective bargaining." The *Safeway Stores* case, decided by the California courts by 1953, is of interest.[74] There a grocery chain, concededly within the federal Board's jurisdiction, bargained with a rank-and-file union of its clerks, to which a minority of its store managers belonged. Safeway refused to grant a demand for a union shop of its managers and was struck and picketed by the union, the minority of managers walking out. The nisi prius court granted a temporary injunction against all picketing and the intermediate court now agreed that the supervisors were not entitled to any federal or state protection; but, continued the majority, they "were thereby thrown back into the jungle of tooth-and-claw labor" relations and it was clear "that the Congress by this enactment [section 14(a)] did not place any restriction on the common law or non-statutory rights of supervisory employees to organize for the purpose of bargaining with their employers and to use any of the recognizedly legal methods of pressure (striking, picketing, etc.) which the common or non-statutory law accorded them as employees." The court attached no importance to the fact that a minority sought a union-shop agreement for it was only under the statutory requirements that majority status was required for such a requirement, and no state public policy was opposed to this minority demand.[75] The injunction against violence was upheld but, insofar as it struck at the picketing to compel bargaining on the desired contract,

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[73] Talladega Cotton Factory, supra note 70.

[74] Safeway Stores, Inc. v. Retail Clerks' International Ass'n., 234 P. 2d 678 (1951), is the first appeal, from the superior court's granting of an injunction, with a majority of the present court of appeal upholding the injunction as to violence and denying it as to picketing; a further appeal followed to the supreme court 41 Cal. 2d 567, 261 P. 2d 721 (1953), in which a majority modified the court of appeal and upheld the superior court (in effect reversing the intermediate court) and granted the injunction in its entirety.

[75] If this were not the law and only a majority could make such a demand then the strike would be for an illegal purpose or object and hence enjoinable. See FORKOSCH, TREATISE ON LABOR LAW §174, fn. 86, pp. 454-6 (1953), illustrating various aspects of the illegal purpose doctrine.

modified.[76] The supreme court of the state now reversed this modification and reinstated the injunction in its entirety, but its reasoning went even further than that of the lower court insofar as our present analysis is concerned. The immaterial (for us) basis for its determination was that the state's public policy was opposed to any division of loyalty by the managers, i.e., to the employer and to the union, and "that the coercion sought to be exercised by the defendants under the circumstances of this case was not reasonably related to any legitimate interest of organized labor; that the activities of the defendants were not in furtherance of any proper labor objective, and that as a matter of sound public policy were enjoinable . . . ."[77] To arrive at this conclusion, however, the question of federal preemption and proscription of state action had to be answered, and with but a casual reference to the 1942 *Allen-Bradley* case, the court now held that by Congress' exclusion of supervisory employees, "the field as to them was left open to state control."[78]

This cavalier treatment of federal intention does not ring true, regardless of the result in this particular case, for public policy is a shifting concept which, when judicially determined, may be judicially altered; federal policy and intent may therefore be forced, willy-nilly, to shift course not alone as the geographical limits of a state dictate, but also within a state itself as the whimsies of its judges dictate. The reasons for these conclusions return us to the *Bethlehem Steel* case. There the Supreme Court reasserted the settled rule that state exclusion may be implied from the nature of the legislation and the subject matter, even though expressly not so declared; the Court felt that such exclusion could be there inferred although Congress had not seen fit to set forth even a general guide to the construction of the statute, as it had done in other fields, e.g., the Securities Act of 1933, the Securities Exchange Act of 1934, the United States Warehouse Act;[79] but since this *Bethlehem*

[76] Quotations at 234 P. 2d pp. 681 and 687 respectively. The dissenting view was that while supervisors could join a rank-and-file union an interstate employer was not statutorily required to treat with them and a strike to compel this was for an illegal purpose and therefore enjoinable.

[77] 261 P. 2d 726 (1953). The minority dissented on this view of public policy and therefore desired to overthrow the entire injunction. They apparently were in agreement with the majority on the question of state ability to act despite the federal statutory policy and mandate in §14(a).

[78] 261 P. 2d at p. 724, referring to the *Allen-Bradley* case, supra note 52, and also citing Gerry of California v. Superior Court, 32 Cal. 2d 119, 194 P. 2d 689 (1948).

[79] Supra note 65, at pp. 771-2, the first Act stating that "Nothing in this subchapter shall effect the jurisdiction of the securities commission . . . of any State or Territory . . . or the District of Columbia, over any security or any person." 48 STAT. 84 (1933) 15 U.S.C. §77r. The second act, in 48 STAT. 903 (1934) 15 U.S.C. §78bb(a), repeated this language concerning only the State and then added, "insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." Although the first statute does not have these words of limitation upon state action, such is the construction placed upon it.

decision the federal legislature has given us several guides, not alone in the various sections of the Act heretofore cited and quoted, as well as the Congressional intent as found in committee reports, but also in the new proviso to section 10(a) of the amended Act, which permits federal cession of jurisdiction where the state act and interpretation are in harmony with the federal law and interpretation. The original section, before the 1947 amendments struck the language from the statute, made the power of the federal Board to prevent unfair labor practices "exclusive" and not to "be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." While Bethlehem's co-appellant, in its brief on appeal, urged that the Board's exclusive power to determine the bargaining unit and to certify the representative "is further demonstrated by the provisions" just quoted, the majority and dissenting opinions did not allude to this language as a criterion but, in this writer's view, the present amended language is now definitely expressive of a federal intent which must be honored. That intent does not draw a fine distinction[80] between a representation proceeding (the *Bethlehem* case) and an unfair labor practice matter (under section 10[a]), for if Bethlehem had refused to bargain with a federally certified unit foremen it might have been proceeded against for a violation of present section 8(a)(5), at which time the jurisdictional issue would have had to be judicially resolved.[81] New section 10(a) may no longer

Travelers Health Ass'n v. Virginia, 188 Va. 877, 51 S.E. 2d 263 (1949), *affd.* on questions of due process concerning acquisition of jurisdiction, 339 U.S. 643. The third act, 46 STAT. 1465 (1931) 7 U.S.C. §269, authorizes the Secretary of Agriculture "to cooperate with State officials . . . but the power, jurisdiction, and authority conferred upon [him] . . . shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect." Under this last statute federal control displaces hostile state control, In re Farmers Cooperative Ass'n., 69 S.D. 191, 8 N.W. 2d 557 (1943), although the act evinces an intention to cooperate with state officials, Merchants Exchange of St. Louis v. Missouri ex. rel. Barker, 248 U.S. 365 (1919); while the licensee cannot be required by a state to do more than the federal act or regulations require, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), the federal statute does not prevent all state regulations even though involving and affecting interstate commerce. Indepedent Gin & Warehouse Co. v. Dunwoody, 40 F. 2d 1, (5th Cir., 1930); Edward R. Bacon Grain Co. v. Chicago, 325 Ill. App. 245, 59 N.E. 2d 689 (1945).

[80] In subds. g, h, and i we draw many such fine distinctions, so that it may be argued that we cannot play fast and loose with our methods but must be consistent here and there. Since our concern is with the federal intent, our methods cannot become the end, so that we may refuse to draw distinctions here and insist upon them later.

[81] This was the factual situation in N.L.R.B. v. Edward G. Budd Mfg. Co., 169 F. 2d 571, 574 (6th Cir., 1948), although there the employer was found by the Board to have discouraged membership in the foremen's association, etc. In reliance upon the *Packard Motor Car* case, supra note 66, the Sixth Circuit had earlier held, in the instant case, that foremen were statutorily protected but the Taft-Hartley Act became law twenty days thereafter; the employer sought certiorari and the Supreme Court remanded "for consideration of the effect"

make the Board's power "exclusive," but Congress has still retained jurisdiction because its proviso empowers the federal Board "to cede to such [local] agency jurisdiction over any cases in any industry" under the Act "unless" the local statute or interpretation "is inconsistent with the corresponding provision of this Act . . . ." The reason for withdrawing the exclusive power of the Board, but still retaining exclusive jurisdiction vis-a-vis states, is not a play upon words, and the conference report by the House Managers, who met with the Senate's representatives to iron out disagreements between the bills passed by their respective bodies, so discloses.[82] In other words, federal (Board) jurisdiction has never been Congressionally rejected or disavowed completely so as to permit states automatically to enter, but, insofar as foremen or supervisors are here discussed, is this the federal intent as to them (so as to demonstrate that the *Safeway* decisions are incorrect)? Again the congressional desire is disclosed by its own choice of language,[83] with no distinction being made between representation and unfair labor practice proceedings,[84] and while

of the new statute, and the case was now before the Court of Appeals on such remand. "We believe," said the intermediate court, "that it is clear that Congress . . . intended that employers be free in the future to dsicharge supervisors for joining a union, and to interfere with their union activities. The cease and desist provisions of the Board's order would enjoin the respondent from engaging in conduct in the future which is now lawful." At p. 579. In the companion case to the *Bethlehem Steel,* i.e., Allegheny Ludlum Steel Corp. v. Kelly, decided in the same opinion, the employer sought a declaratory judgment and a restraining order from the state court to prevent the state board from determining the issues.

[82] H.R. REP. No. 510, 80th Cong., 1st Sess. (1947) p. 52: "The House bill omitted from section 10(a) of the existing law the language providing that the Board's power to deal with unfair labor practices should not be affected by other means of adjusting or prevention, but it retained the language of the present act which makes the Board's jurisdiction exclusive. The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

[83] See also H.R. REP. No. 245, 80th Cong., 1st Sess. (1947) p. 40, commenting upon "The rule of exclusive jurisdiction" under the federal act, which "is an illustration of such a policy. It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. Moreover, the bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen."

[84] S. REP. No. 105, 80th Cong., 1st Sess. (1947) p. 26, that the proviso "permits the National Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries . . . ."

the Senate minority report inveighed against the exclusion of supervisors (foremen) from the protection of the proposed Act, they agreed "with the majority that it is desirable thus [by section 10(a)] to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems." The proposal is made necessary by the decision of the Supreme Court in the companion representation case to the *Bethlehem* case.[85] The federal policy concerning (interstate) foremen as employees is exclusively for Congress to determine,[86] and the particular intent and policy have been clearly enough expressed to find that, absent a cession under section 10(a)'s proviso, state boards and courts have no power or jurisdiction ordinarily to interfere in the labor relations between an employer and his supervisors.[87]

If this analysis is correct then the reasoning in the *Safeway Stores* case is incorrect, but, regardless, another avenue of the federal-state conflict over jurisdiction is indicated. This avenue involves the question whether, and to what extent, a state's policy, and common law decisions and statutory enactments, can exist independently of or in conjunction with the federal law; in the *Safeway* case the state's policy was judicially determined and made the basis for a judicial injunction to enforce such (judicial) policy, but the effect of the federal policy and statute was held inapplicable (although, as we have seen, wrongly so). How far, if at all, may a state law, or a state judicial decision, go and yet not conflict with the federal law and policy? We discuss first the question of a federal conflict with local enactments, thus involving the statutory law, and then with local judicial decisions based upon and involving the common law.

e.) The positive jurisdiction of the Labor Board: preemption by federal statute and Board action—the state's commerce powers.

In the *La Crosse Telephone* case, decided in 1949, the Supreme Court felt that a Wisconsin board's certification of a union as the employees' representative could not stand when, under the original Wagner Act, "the industry is one over which the National Board has consistently exercised jurisdiction."[88] The result so reached, continued the opinion, was not changed by the 1947 amendments permitting cession,

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[85] *Ibid.*, at p. 500.

[86] N.L.R.B. v. Edward G. Budd Mfg. Co. *supra* note 81, at pp. 578-9: "Whether it is desirable or undesirable, as a matter of policy, for foremen to organize and be classified as employees, is for Congress, not the Court, to determine," citing the *Packard Motor Car* case, *supra* note 66, at pp. 490, 493.

[87] See, e.g., note 95, *infra,* and also note 16, *supra,* at pp. 114-5.

[88] La Crosse Telephone Corp. v. W.E.R.B., 336 U.S. 18, 25 (1949). There the state act permitted a majority vote of employees to constitute that group a unit, whereas "The federal act leaves that matter to the discretion of the board. . . . [The state act thus] freezes into a pattern that which the federal act has left fluid." At pp. 25-26. The court also found that federal administrative practice disposed of cases without formal orders so that a state certification on a different basis might easily disrupt this federal method.

for none appeared to have occurred. "We are satisfied with the wisdom of the policy underlying the *Bethlehem* Case and adhere to it,"[89] concluded the court. The following year the Supreme Court felt that the labor practices of employers had been made subject to the exclusive jurisdiction and regulation of the Labor Board under the federal statute, for it now reversed a Wisconsin board's ruling whereby an employer was found guilty of a state unfair labor practice, citing *Bethlehem* and *La Crosse* in its per curiam decision;[90] three months later a state requirement that a strike vote of a majority of the employees be a condition precedent to any strike was denounced because "Congress has not been silent on the subject of strikes in interstate commerce," namely, by establishing its own procedures in section 8 (d), forbidding strikes for certain objectives, section 8(b)(4), or which might create a national emergency, section 206 et seq. "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."[91] But what of a situation involving a state's police powers when exercised to prevent the impairment or cessation of vital services and supplies, e.g., transit and gas? In 1941 the Supreme Court denounced a Wisconsin law which prohibited strikes against public utilities and required compulsory arbitration after collective bargaining had failed, the reason being that section 7 of the federal act expressly safeguarded for all (interstate) employees the right to strike and that Congress had qualified this right by section 8(d)'s requirements of notice and section 8(b)(4)'s prohibitions where unlawful objectives were involved; therefore, concluded the court, federal occupation of the field closed it to state regulation, quoting the *O'Brien* language just set forth.[92]

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[89] *Ibid.*, at p. 26.

[90] Plankinton Packing Co. v. W.E.R.B., 338 U.S. 953 (1950). In Amalgamated Ass'n. of Street, Electric Ry. & Motor Coach Employees v. W.E.R.B., 340 U.S. 383, 390 (1951), fn. 12, Chief Justice Vinson wrote that the *Plankinton* case involved a state board's "reinstatement of an employee discharged because of his failure to join a union, even though his employment was not covered by a union shop or similar contract. Section 7 . . . not only guarantees the right of self-organization and the right to strike, but also guarantees" the right to refrain therefrom, "at least in the absence of a union shop" etc. "Since the N.L.R.B. was given jurisdiction to enforce the rights of employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. *Plankinton* and *O'Brien* both show that states may not regulate in respect to rights guaranteed by Congress in §7."

[91] International Union, UAW v. O'Brien, 339 U.S. 454, 457 (1950), citing the *Plankinton, La Crosse,* and *Bethlehem* cases, as well as Hill v. Florida.

[92] *The Amalgamated Association* case, *supra* note 90, at p. 390. Vinson's opinion then went into a discussion of why public utilities were to be treated no differently than all national manufacturing organizations and concluded with examples of the direct conflict in the record between the two acts and policies. There is, however, another aspect to be discussed. The Chief Justice overruled the argument that this was local emergency legislation, comparable to the federal legislation in §206 of the Taft-Hartley Act, by pointing out that it was "a com-

These opinions and decisions are not difficult to comprehend, although difficulty of application to particular facts is always present,[93] but the 1949 *Algoma Plywood* case[94] creates a slight ripple upon the sea of understanding. There a majority of seven felt that even though federal certification of a union had occurred, and a closed-shop agreement which was valid under the original Wagner Act had been entered into, Wisconsin could still hold an employer guilty of an unfair labor practice for discharging an employee who refused to pay union dues where the state law required such an agreement to be ratified by a two-thirds vote of the employees before it could become effective. The effect of the Taft-Hartley amendments in section 10(a), considered above, was discussed, but the conclusions reached were not disturbed;[95] the argument that new section 14(b), which permits state laws which prohibit union-shop agreements to supersede federal policy within that locality, was effective only when such a law prohibited, but not when it regulated, these agreements, was rejected because of the section's legislative history; and, finally, it was held that "The character of activities left to State regulation is not changed by the fact of certification."[96]

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prehensive code for the settlement of labor disputes between public-utility employers and employees." He then went on to say that "In any event" there was federal preemption. The inference drawn is that while no emergency legislation was here involved, still any such emergency statute woud have a like fate had it conflicted.

[93] By this time the states were, to put it mildly, confused. Thus Minnesota and Mississippi held that states no longer had jurisdiction of any conduct which violated any provision of the federal act, while Alabama, Massachusetts, Missouri and New York held otherwise. Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N. W. 2d 94 (1950); Reed Constr. Co. v. Building Council, 27 L.R.R.M. 2161 (Miss. 1950); Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 So. 2d 112 (1951) (see also note 126, *infra*), Thayer v. Binnall, 326 Mass. 467, 95 N.E. 2d 193 (1950); Kincaid-Webber Motor Co. v. Quinn, 362 Mo. 375, 241 S.W. 2d 886 (1951); Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E. 2d 697 (1951).

[94] Algoma Plywood & Veneer Co. v. W.E.R.B., 336 U.S. 301 (1949).

[95] *Ibid.*, at p. 313: "One phrase, however, reinforces those conclusions; that is the phrase 'inconsistent with the corresponding provision of this Act.' These words must mean that cession of jurisdiction is to take place only where State and federal laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary, because the State's jurisdiction is unimpaired. This reading is confirmed by the purpose of the proviso in which the phrase is contained; to meet situations made possible by" the *Bethlehem Steel* case, "where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction."

[96] *Ibid.*, at p. 315. Certification merely disclosed that the employer and the union were subject to federal law, continued the opinion, so that "as to this employer the State shall not impose a policy inconsistent with national policy, or the National Board's interpretation of that policy," citing the *Hill* and *Bethlehem* cases as well as the *La Crosse* case. The "enumeration" of unfair labor practices "over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal

f.) The positive jurisdiction of the Labor Board: preemption by federal statute and Board action—the state's traditional police powers.

Apart from a conflict between federal and state labor relation statutes, there is the vast area of state decisional (and statutory) law, in general, which may impinge upon or conflict with federal policy and law. Since most states do not have labor relation acts or boards the bargaining relations between local employers and employees are supervised and controlled by particular statutes and judicial decisions; even where local acts and boards are found the decision law, especially with respect to picketing, is of vital importance. This area is therefore of major concern but the present examination must be limited in scope to those situations in which a conflict with the Federal Act or Board is involved. Again congressional intent plays a large part in the discussion, and again a state's power to act comes to the fore, but whereas it was the latter's concurrent power over commerce which was previously of importance, it may now be the state's police power which is the major peg to support local action. A good deal of what can be set forth here concerning the theoretical background has already been discussed, so that we are not upon strange ground; for example, the state's power to act upon interstate commerce is not always affected by congressional action, for the judiciary has said that the nation is concerned primarily with purpose, not method, and absent congressional preemption the states may characterize any wrong of any kind as an unfair labor practice or otherwise seek to prevent or give relief from or because of it. Whereas the judicial resolution of the commerce conflict involved the interstate-intrastate dichotomy of a concurrent power, so that local action was permitted where national preemption or policy had not forbidden it, the present approach involves a federal commerce power versus a state's police power, likewise previously mentioned but only in passing. This concept starts with a federal exercise of a conceded power over interstate commerce (and reaching intrastate, also, as disclosed in subd.1), with the states now acting under their police powers; in the 1942 *Allen-Bradley* case, previously discussed in conjunction with *Hill* v. *Florida*, the federal unamended statute then contained a listing of only employer unfair labor practices in section 8, so that a state law could hold a union guilty of an unfair labor practice involving mass picketing, violence, etc.; now, however, section 8 contains a separate listing of union unfair labor practices, so that Congress may not alone have positively preempted that field of legislation also but, even if it has not, it may have now disclosed a negative intent to prevent state action under the latter's police powers.

The *Wisconsin Auto Workers* case, decided in 1949, is of interest. There a bare majority upheld a Wisconsin board's order preventing individual defendants and members of a union, certified as the bargaining

law," said the court, at p. 314, and §14(b) granted the states permission "to carry out policies inconsistent with the Taft-Hartley Act itself," albeit within its limited application.

representatives of the Briggs & Stratton Corporation's employees by the Federal Board, from engaging in "quickie" strikes.[97] "The substantial issue", wrote Mr. Justice Jackson, "is whether Congress has [affirmatively] protected the union conduct which the state has forbidden, and hence the state legislation must yield."[98] The answer was sought (as with the approach in the factual situation in the *Bethlehem*[99] and other cases) in a "clearly manifested" intent of Congress to exclude the states from the exercise of their traditional police power control, but none was found; "the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner. While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states."[100] Thus the *Allen-Bradley* (original Wagner Act) and *Wisconsin Auto Workers* (amended Wagner Act) cases permit a state, by its labor relation statute, and with its local board's processes, to prevent activity condemned under its police powers (even though expressed in such an act), so long as "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned."[101] Thus both cases hold against federal pre-

[97] International Union, UAW, Local 232 v. W.E.R.B., 336 U.S. 245, 249 (1949), "The stratagem consisted of calling repeated special meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend."

[98] *Ibid.*, at p. 252. "No serious question is presented by the Commerce Clause of the Constitution standing alone. It never has been thought [negatively] to prevent the state legislatures from limiting aggression and substituting judicial processes for personal vengeance."

[99] At p. 254 the *Bethlehem* case was held "not analogous" to the instant case, but this was because of the factual differences which the opinion now pointed out. We are here speaking of an "approach" however, which is the same in both cases.

[100] *Ibid.*, at p. 253. The court also pointed out that actual property damage had occurred in this case. See also N.L.R.B. v. International Rice Milling Co., 341 U.S. 665, 672 (1951), reiterating this view but pointing to §8(b)(1)(A) as a possible source of Labor Board power to reach violence.

[101] 336 U.S. at p. 254. The balance of the opinion discusses the effect of §§7 and 13 of the Federal Act, and the right of workers to strike, and states, among other things, that "it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board." At p. 263. This quickie strike "was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effect on that interstate commerce which Congress may regulate." at p. 265.

emption but distinguish between (federal) purpose and (state) method, i.e., apparently (but, as we shall conclude, no longer) saying that the Federal Act strikes at illegal purposes, whereas the states are free to control illegal methods;[102] from this point of view one could argue that any state effort to control union conduct because of illegal motives is to be denounced, and that all state effort to control union conduct because of illegal methods is to be upheld. This, however, is not a watertight compartmentalization, for state control of otherwise lawful union conduct (e.g., peaceful picketing) has been upheld where no preemption or proscription was claimed and the state's valid laws or policies were being thereby subverted;[103] no federal intent is therefore apparent to negate all state action, even though preemption has not taken place, i.e., the federal statute does not deal generally and in all respects with strikes and picketing, so that states may deal with this conduct unless and to the extent they are prohibited, e.g., the *O'Brien* case.[104]

The *Garner* opinion, however, questionably suggests the possibility of a somewhat different conclusion. There a trucking concern formed a link to an interstate railroad, with four of its twenty-four employees being union members; the union peacefully picketed the truckers, none of these picketers being employees, with drivers for other carriers refusing to cross these lines; as a result, almost 95% of the employer's business was lost. The lower Pennsylvania equity court found that the union's "purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union;" that a violation of the state's labor relations act thereby resulted; and that an injunction should therefore issue. The state's Supreme Court ("quite correctly, we think," said Mr. Justice Jackson for the unanimous bench) felt that the employer's grievance fell within the jurisdiction of the Federal Labor Board to prevent unfair labor practices so that state remedies were precluded. In §8(b)(2) of the amended Wagner Act, pointed out the Justice, "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of

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[102] See, however, note 121, *infra.*

[103] E.g., beginning with Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (see note 109, *infra,* however), enjoining such picketing where Missouri's antitrust laws were thereby violated, despite the alleged identification of picketing with the constitutionally-protected free speech aspect thereof, thus placing Thornhill v. Alabama, 310 U.S. 88 (1940), in its proper perspective; for later illustrations see Building Service Employers International Union v. Gazzam, 339 U.S. 532 (1950); International Brotherhood of Teamsters, etc., v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court 339 U.S. 460 (1950) (compare this with New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 [1938], a different approach to the same policy question). Of course, the question of federal preemption may denounce what the due process clause permits, when a plenary power is involved, as hinted in Note 109, *infra.*

[104] *Supra* note 91.

coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief." "This case would warrant little further discussion," continued Jackson, "except for a persuasively presented argument," which he thereafter proceeded to reject, that the Federal Board "enforces only a public right on behalf of the public interest, while state [board or] equity powers are invoked by a private party to protect a private right."[104a] Then, as obiter, he remarked: "The detailed prescription of a [federal] procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the Federal Act prohibits."[104b] If this approach is sound then it would follow that much of what has been judicially determined, and much of the jurisdiction of a state, is to be negated; the reasoning is simple: in interstate commerce the federal government is supreme; congressional intent to preempt or prohibit state action controls; that intent may be expressed or implied; in the federal statute Congress has listed a series of union acts (e.g., strikes or picketing or both) which

[104a] Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, AFL, 346 U. S. 485, 492 (1953). A lengthy analysis of this argument resulted in a conclusion that "when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit. On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State." at pp. 500-1.

[104b] *Ibid.*, at pp. 499-500.

are condemned and which may be proceeded against by the Board through its complaint processes and by its application to the judiciary for a temporary injunction; if only picketing for these purposes is to be denounced, and all other picketing is to be permitted, then picketing for these purposes can be acted upon only by the federal government and states have no power thereon;[104c] the intent of Congress must therefore be that picketing for all other purposes is not to be acted upon by the federal government, i.e., the Labor Board, which has no jurisdiction in these other fields; does the corollary follow that the states may or may not denounce picketing in this last area? The implied desire of Congress is, according to Jackson, against state action even where any other purpose is involved, but he could just as well have opined that the federal intent is to permit state enjoining of picketing where other purposes are found to exist. And, as we have seen, this would have been more in line with the views of the Supreme Court which, to this point, had adopted a seemingly contrary view.[104d]

While the fork in the road of congressional intent has not yet been so clearly marked that the Jackson dictum may be accepted or rejected, the *Capital Service* case, decided May 17, 1954, but with the Justice taking no part in its consideration or decision, is of aid. There an employer sought to stop secondary picketing by seeking a state injunction and simultaneously filing charges with the Federal Board. The state banned all picketing but a month later the General Counsel, by the Regional Director of the Board, issued a complaint on a limited basis, i.e., that picketing for informational purposes was lawful, but to induce employees of other employers not to work was not, and the Director now sought a federal temporary injunction to restrain this latter union conduct. However, the state injunction blanketed even the otherwise good union picketing, and so the Director simultaneously sought another federal injunction against the employer enjoining him from enforcing the state injunction. The Supreme Court now upheld the issuance of these injunctions, holding that because of the vesting of exclusive jurisdiction in the Board "the intrusion of a state would result in a conflict of functions" so that a federal district court must "have unfettered power to decide for or against the union, and to write such decree as it deemed

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[104c] This is the *Garner* holding, subject to the qualification expressed in note 106, *infra.*

[104d] See, e.g., cases in note 103, *supra,* and also Local Union No. 10, United Association of Journeymen Plumbers & Steamfitters v. Graham 345 U. S. 192 (1953), upholding the Virginia "right to work" law, although it may be objected that §14(b) of the Federal Act specifically permits such local prohibitions of union shops to be effective in interstate commerce situations, and that this case involved a due process argument, i.e., the state law violated the 14th Amendment's prohibition against state restrictions upon free speech. However, at p. 201, the majority opinion reaffirmed the authority of a long line of decisions, including those referred to above.

necessary in order to effectuate the policies of the Act, [and] it must be freed of all restraints from the other tribunal."[104e]

g.) The positive jurisdiction of the Labor Board: the Garner case and the Board's primary jurisdiction.

All of these concepts were repeated in the 1953 *Garner* and 1955 *Anheuser-Busch* opinions. The *Garner* opinion unanimously agreed with the Pennsylvania Supreme Court that the state (whether by a board or a court) could not prohibit peaceful picketing because "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden unions to exert certain types of coercion on employees through the medium of the employer."[105] There was thus no instance of injurious conduct which the Federal Board was powerless to prevent, nor did it encompass a situation of violence which was traditionally within the local government's powers, "Nor is there any suggestion that respondent's plea of federal jurisdiction and pre-emption was frivolous or dilatory, or that the Federal Board would decline to exercise its powers once its jurisdiction was invoked."[106] Since the Federal Board had primary jurisdiction, having been vested with power to entertain the grievance, issue a complaint, and apply for a federal temporary injunction pending its determination, a state board or court could not, as could not a federal court, in advance of some Board action (or indication of inaction or rejection), adjudge the same controversy and extend its own form of relief; the reason was that not alone had a federal substantive rule of law been set forth, but, more important, a centralized administration of specially designed procedures was felt to be necessary for the uniform application of the statute's substantive rules, and to avoid local diversities and conflicts in remedies which might result.[107] "The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity a conflict is imminent. . . . But . . . there is no indication that the statute left it open for such conflicts to arise."[108]

[104e] Capital Service, Inc. v. N.L.R.B., 347 U.S. 501, 505-6 (1954), concluding that "To exercise its jurisdiction freely and fully it must first remove the state decree." See, however, N.L.R.B. v. Swift & Co. 130 F. Supp. 214, 28 Lab. Cas. par. 69, 147 (D.C. Mo. 1955), where the Board's request to enjoin state action was declined because of a possible due process argument, and also because of Board rejection.

[105] *Supra* note 104c., at pp. 488-9. In Pennsylvania the equity courts enforce the labor relations statute, p. 498.

[106] Ibid., at p. 488. See also Building Trades Council v. Kinard Construction Co., 346 U.S. 933 (1954), citing the *Garner* case and repeating this suggestion.

[107] 346 U. S. at p. 490. It is entirely possible that Congress might well have been surprised at this analysis of its intent, but the present judicial approach is excellently patterned upon that found in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co. 204 U.S. 426 (1907).

[108] 346 U.S. at pp. 498-9.

The *Anheuser-Busch* case involved a jurisdictional conflict between the Machinists and Carpenters Unions, with the brewery in the middle. The employer, under pressure from the Carpenters, refused to sign a contract giving the Machinists' members certain repair work when necessary, and this latter union struck. On April 8, 1952, Anheuser-Busch filed an 8(b)(4)(D) charge against the Machinists with the Board, and on April 19th sought and obtained a temporary and then permanent injunction against the union but alleged not alone a violation of subd. D but also of subds. A and B, of section 303(a)(1)(2) and (4), and "a secondary boycott under the common law of the state of Missouri," as well as amending its complaint shortly thereafter to include the additional claim that the Union's "conduct constituted an illegal conspiracy in restraint of trade under Missouri common law and conspiracy statutes." Thereafter the Labor Board held no "dispute" existed under section 8(b)(4)(D), and the Missouri Supreme Court affirmed the permanent injunction because, no labor dispute existing, and the union's conduct violating the state's act against restraints of trade, "the allegation on which the injunction issued excluded the basis for a charge of an unfair labor practice under the Taft-Hartley Act."[109] The Supreme Court decided the preemption question against the State, for the Labor Board's ruling involved only a subdivision D charge, whereas the employer's complaint in the state court involved subds. A and B as well, and "The point is that the Board, and not the state court, is empowered to pass upon such issues in the first instance," i.e., the primary jurisdiction holding of the *Garner* case; and even if there were no unfair labor practice involved, continued the court, the Machinists' conduct "may fall within the protection of §7. . . ."[110]

The emphasis in the *Garner* and *Anheuser-Busch* cases is upon the primary jurisdiction of the Federal Board, i.e., that when a federal question is, or even may be, involved, and Congress has set up a specialized agency to deal with it, then it is the legislative intent that such agency should get first crack at the problem, thereby permitting a uniform policy to be developed at the national level in interstate commerce, applicable throughout the country by whatever court or agency may seek to enforce it. This concept of primary jurisdiction is not alone binding upon state boards and courts but also upon federal courts; when to this is added

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[113] United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 658, 659 (1954), respectively. Burton wrote the opinion, with Jackson not participating. The *Garner* case was relied upon by the Missouri court to sustain the injunction. "But Giboney was concerned solely with whether the State's injunction against picketing violated the Fourteenth Amendment. No question of federal preemption was before the Court; accordingly, it was not dealt with in the opinion." See also the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS p. 299, fn. 177 (1955), indicating a view that the Giboney case would today be held covered by §8(b)(4)(A) of the Taft-Hartley Act.

[110] 75 Sup. Ct. at p. 486.

the separate doctrine of the required exhaustion of administrative remedies before appealing to the judiciary, then the two doctrines combine to prevent, for any practical purposes, the ousting of the Labor Board's jurisdiction by any federal district court.[111]

h.) The positive jurisdiction of the Labor Board: the area of state ability to act.

The "historic" and "traditional" area of state police power within which the *Allen-Bradley* case permitted the states to function, as well as the area outside federal pre-emption, as disclosed in the *Wisconsin Auto Workers* case (together with the judicial nuances emanating from these concepts), were thus somewhat modified by the primary jurisdiction approach developed in the *Garner* and *Anheuser-Busch* cases. This latest development, however, if pressed to its outermost limits, could well dislodge all state efforts in the traditional and the non-preempted areas, for the judiciary might easily find a congressional intent that its legislation either covered the field completely, rejected any coverage whatsoever, or else permitted only partial federal control and none other. And, since the federal commerce power penetrated deep into a state's vitals (subdivision 1, supra), the judiciary would not be inclined to extend federal labor relations control without simultaneously permitting an extension of the federal commerce power control. How much these and other logically drawn consequences weighed upon the judicial mind, and how much other factors entered their deliberations (e.g., the considerations set forth at the conclusion of subdivision 1), is speculative;[112] the fact is that at the same term that *Garner* was decided, although six months later, the *Laburnum* opinion was handed down. Here an affiliate of the United Mine Workers had "threatened and intimidated [interstate] respondent's officers and employees with violence" and its conduct was assumed by the court to constitute a violation of section 8(b)(1)(A); Laburnum did not seek Labor Board aid but sued in the Virginia courts

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111 Suppose, however, that picketing of a neutral (which immediately suggests a secondary boycott and an injunction under §8[b] [4] [A]) is not an unfair labor practice or a protected concerted activity, may a state court enjoin it? In Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, Branch 16, AFL, 27 Lab. Cas. par. 69, 114 (1955), the Wisconsin Supreme Court said: "Until such time as the United States Supreme Court has ruled to the contrary, we believe it to be our duty to hold that there has been no pre-emption by Congress over the type of secondary picketing of neutrals herein enjoined by the trial court in carrying out the policy of this state as expressed in its statutes prohibiting the same. We hope the United States Supreme Court will pass directly on this important question in the not too distant future."

112 Consider, for example, the argument that the appointment of a Republican to the office of Chief Justice thereafter resulted in a revulsion against *Garner*, even though *Anheuser-Busch* had to follow in its footsteps. The fact is, however, that Chief Justice Warren sat on the *Garner* bench and that it was a unanimous opinion, including all Democrats and Republicans on the court, and that the *Anheuser-Busch* case was likewise such a decision except that Black concurred and Harlan, just appointed, did not participate.

for damages, alleging a common law tort action; the union now claimed, and the Supreme Court was called upon to decide whether, the Federal Board had "exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?"[113] Note that whereas *Garner* spoke of primary jurisdiction, *Laburnum* spoke of exclusive jurisdiction; the distinction is important, and in subdivision d of this article we have differentiated between these terms. In other words, while *Garner* forbade the states from initially acting upon conduct which possibly could be made the basis of Board action, e.g., the prevention of the listed unfair labor practices, it was now contended "that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct." The Court rejected this plea and differentiated the two cases thus:

> In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. [I.e., the law would be unconstitutional.] To do so will, in effect, grant the petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act.[114]

But suppose Congress had provided a remedy for the damages suffered because of such tortious conduct? Then, reasoned the court by analogizing to section 303(b) which gives a cause of action for injuries suffered by violations of section 8(b)(4), there would be assurance of uniformity in rights of recovery in federal or state courts which would preclude other like remedies. "On the other hand, it is not consistent to say that Congress, in that section [303(b)], authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us." Nor, continued the opinion, does the Board's powers under section 10(c), to issue a cease and desist order against such conduct, mean that the states were ousted from

[113] United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 658, 659 (1954), respectively. Burton wrote the opinion, with Jackson not participating and Douglas (Black concurring) writing a dissenting opinion.

[114] *Ibid.*, at pp. 663 and 663-4, respectively. The opinion then quoted from the *Garner* case, including therein quotations from the *Wisconsin Auto Workers* and *Allen-Bradley* cases, and then pointed out that the Act set up no method for compensation except in a very minor way for employees.

permitting this action, for "There is no declaration that this [Board] procedure is to be exclusive."[115] *Laburnum*, in conjunction with the cases heretofore discussed, somewhat clarifies the pattern emerging from the opinions, for the federal statute is now to be set up as a base upon which all state action is to stand or fall. For example, does the state law or board or judicial action parallel and collide with the Federal Board or judicial possible action; if so, then the state is bereft of such power to act and cannot, for example, restrain picketing, even if its own laws are violated.[116] Or, does the federal statute grant relief of a nature other than the Federal Board can grant, e.g., a damage suit under section 303(b); if so, then local action in this respect is also forbidden. However, suppose no recourse to the statute or Board aid is possible when certain conduct occurs; in such event the localities have power (unless otherwise restrained) to control this conduct by their own unfair labor practices, injunctions, etc. And, following along this approach, even if Board aid is possible, but only of a limited nature, state action which supplements this and does not interfere or diminish or prevent the federal effort is permitted, as is state action when no such Board action or federal court suit is possible.[117] These are generalities, of course, and the statements

[115] *Ibid.*, at pp. 666 and 667, respectively. Continuing, at pp. 668-9, the court quoted from S. REP. No. 105, and from Senator Taft's remarks in Congress, to show that "There is no reason in the world why there should not be two remedies for an act of that kind." The latter's remarks, 93 CONG. REC. 4024 (1947). The dissent contained this statement: "I think that for each wrong which the Federal Act recognizes the parties have only the remedy supplied by that Act . . ." At p. 671.

[116] E.g., Jack Cooper Transport Co., Inc. v. Stufflebeam, 26 Lab. Cas. par. 68, 488 (1954); Truck Drivers, Chauffeurs, etc. v. Whitfield Transportation, Inc. 27 *id.* par. 68, 863 (1954); Precision Scientific Co. v. International Union, 2 Ill. App. 2d 531, 120 N.E. 2d 356 (1954). In Your Food Stores of Santa Fe, Inc. v. Retail Clerks Local No. 1564, 124 F. Supp. 697 (D.C. N.M. 1954), the employer's original effort to obtain a state injunction against picketing proved unsatisfactory, as the unfair labor practice was held to be within the exclusive jurisdiction of the Federal Board (the federal district court so held, the case having been removed); thereafter the employer sought a state injunction on the ground of trespass, the Federal Board rejected a union charge because of its jurisdictional standards (subd. 3, *infra*), and the court now refused the union's plea that the state injunction be halted. The court felt the Board's rejection and the *Laburnum* decision were determinative; it is suggested that while the former may be a good basis for the decision, the latter is not, for the court is now making the name one gives to conduct determinative of the question of jurisdiction. Since the Federal Board could take jurisdiction and apply for a federal injunction even during the pendency of its proceedings, the same local relief could be duplicated federally. Therefore, the possibility of federal action should have resulted in a dismissal of the state trespassing request (of course, we assume the jurisdictional standard question is not involved).

[117] E.g., Buffalo Arms, Inc. v. Molony, 26 Lab. Cas. par. 68, 637; Wortex Mills, Inc. v. Textile Workers Union, 380 Pa. 3, 109 A. 2d 815 (1954); Benjamin v. Foidl, 379 Pa. 540, 109 A. 2d 300 (1954); Arnold Bakers, Inc. v. Strauss, 138 N.Y.S. 2d 404 (1955), citing Isbrandtsen Co. v. Schelero, 118 F. Supp. 579

must be translated into cases and applied to fact situations, with refinement in these broad analyses occurring.

i.) Recapitulation and conclusions.

From all that has been discussed it appears that certification and unfair labor practice conflicts are approached from the same point of view although a somewhat firmer treatment is reserved for the former, it being kept somewhat exclusively within the national fold whereas the latter may or may not be locally treated. "The States are free (apart from preemption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice'."[118] Thus the mere enumeration of employer and union unfair labor practices does not *ipso facto* disclose a congressional intent to prevent or to preempt state action which may be in addition to such federal law, or distinct from it; the intent of the federal legislature must still be sought in every situation yet to arise[119] but obviously, as in the *Garner* or *Wisconsin Public Utility*

(E.D. N.Y. 1954); United Mineral & Chemical Corp. v. Katz, 118 F. Supp. 433 671 (E.D. N.Y. 1954); Willoughby Camera Stores v. Dist. No. 15, International Ass'n. of Machinists, 205 Misc. 455, 129 N.Y.S. 2d 734 (1954). The federal Act thus does not exclude the states from this traditional jurisdiction of an action to restore a union member to membership where he alleges a wrongful expulsion. Real v. Curran, 138 N.Y.S. 2d 809 (1955). In this case the court found that the conduct complained of was within the contemplation of §8(b)(2) but that only two of the three items of relief were within the federal Board's power, it not being able to restore to membership although it could compel back pay and reinstatement to job. It was therefore concluded that the federal Act did not exclude the state from jurisdiction, following Mahoney v. Sailors' Union of the Pacific, 275 P. 2d 440 (Wash. 1954). If, of course, a federal unfair labor practice does not also violate a state law, the latter's courts will not award damages. Garmon v. San Diego Bldg. Trades Council, 273 P. 2d 687 (Cal. 1954).

See also International Plainfield Motor Co. v. Local No. 343, UAW-CIO, 123 F. Supp. 683 (D.C. N.J. 1954), where exclusive federal jurisdiction of damage suits against unions was found in a breach of contract case (a no-strike clause was breached), with the court apparently permitting a simultaneous suit against the union officials, as individuals, in the state courts because no such action was possible under the Taft-Hartley Act. For reasons analogous to those voicing criticism of the *Safeway Stores* case, subd. d, *supra*, this decision appears unsound. If it is the subject matter which is the basis of a conflict, then persons involved are immaterial. While this might superficially permit a bankrupt union to protect solvent officials, the question is not so simply put and answered, for in §301(b) Congress has expressed a policy that only unions be sued and be liable for breach of contract cases.

[118] Algoma Plywood & Veneer case, *supra* note 94, at pp. 305-6.

[119] In the *Anheuser-Busch* case, *supra* note 109, at p. 487, Frankfurter wrote that "Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause." It "outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitations by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action." The *Garner* opinion, *supra* note 104a, at p. 488, states the Federal

cases, an outright conflict must be resolved in favor of the federal statute and, as in the *Wisconsin Transit* case, the positive guarantees of section 7, or, as in the *Plankinton* case, its negative guarantees, cannot be impaired by local action of any kind.[120] In other words, the federal government's plenary commerce powers have been statutorily exercised over labor relations so as to:

(1) Mandate to a federal Board jurisdiction and power to act within a limited area, but within this area it is supreme;

(2) Mandate to employees the positive and negative rights expressed in the federal statute (in addition to any constitutional rights which must be separately considered);

(3) Thereby withdraw from states the power, whether by statute, board, or court action, to infringe upon the individuals' (positive or negative) rights, or the jurisdiction and powers of the federal Board, whether to certify or to hold an unfair labor practice has been committed;

(4) Express a desire, by these mandates and by other factors, that a uniform national policy substantively and procedurally (remedies)[121] is desired, and that states are not to infringe upon this policy area;

Act "leaves much to the states, though Congress has refrained from telling us how much." Thus concluded the Justice. "This prenumbral area can be rendered progressively clear only by the course of litigation." In other word, a case-by-case determination must retain a fluid area for judicial determinations and even reversals of its own opinions.

[120] "When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing federal-state relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in Bethlehem Steel Co. . . . and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers in so far as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation." The *Amalgamated Ass'n.* case, *supra* note 90, at pp. 397-8.

[121] It was previously said that both the Allen-Bradley and Wisconsin Auto Workers cases held against federal preemption and distinguished between federal purpose and state method, i.e., the former struck at illegal motives and permitted the latter to control illegal conduct. These were 1942 and 1949 cases, respectively, and the developments of the past six years have either rejected this tentative judicial exploration into a federal-state rendering, or else a more sophisticated understanding of Congressional intent has required a reconsideration and reevaluation of concepts and approaches.

There is also the question of positive and inferred Congressional intent which, when found, may or may not permit state action. For example, §14(b) of the Taft-Hartley Act permits states to outlaw union-shop clauses in collective bargaining agreements which cover interstate employees, thereby making federal policy subject to state desire. In the Railway Labor Act, 45 U.S.C. ch. 8, §2, Eleventh, union shop agreements are permitted "Notwithstanding any other

(5) Inform the local judiciary that whenever employer or union conduct is (possibly) subject to whatever relief the federal Act may afford, it is outside state authority;[122]

(6) Make not a probability but the possibility of Board acceptance of jurisdiction a sufficient basis for ousting states of jurisdiction to act;[123]

(7) Place upon state courts, as well as upon federal courts, the initial burden that only the latter have borne in the past, i.e., determine, on the pleadings, "whether the subject matter is the concern exclusively of the federal Board and withdrawn from the State;"[124]

(8) Have state courts and boards renounce, when the Board's primary jurisdiction is determined,[125] any local jurisdiction over any request of them for any action upon any conduct which comes within the first five items in the above enumeration;[126]

(9) Permit local statutory or judicial action in commerce fields

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provision of this Act, or of any other statute or law . . . of any State," and it has been held that this provision cannot supersede a state's right-to-work law, and that it can and does. Hanson v. Union Pacific Ry., 24 Lab. Cas. par. 68,095 (Neb., 1954), and Moore v. Chesapeake & Ohio Ry. Co., 26 id. par. 68,640 (Va., 1954) respectively, both nisi prius courts. It is submitted that the latter decision is the correct one and follows not alone the express language of the statute, but also the intent of Congress which desired uniformity in railroad labor relations. See, e.g., Currin v. Wallace, 306 U.S. 1, 11 (1939), for language descriptive of the necessity for federal control.

[122] Amalgamated Clothing Workers of America v. Richman Bros., 348 U.S. 813, 75 Sup. Ct. 452, 454 (1955), referring to the *Anheuser-Busch* case. See, however, Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278 (S.D. N.Y. 1951), where it was held that §301 had preempted the field so that states could no longer enforce these agreements; a better conclusion with better reasoning is General Bldg. Contractors' Ass'n. v. Local Unions etc., 370 Pa. 73, 87 A. 2d 250 (1952), permitting a state injunction in violation of a collective bargaining agreement, the court reasoning that §301 involved only damage suits and no congressional policy to preempt the field of equity suits could be inferred. See also Real v. Curran *supra* note 117.

[123] *Supra* note 106.

[124] The *Anheuser-Busch* case, supra note 109, at p. 487.

[125] The local authorities must initially determine their own jurisdiction, subject to eventual Supreme Court ruling, and the "ascertainment of preemption under the Taft-Hartley Act is [not] self-determining or even easy. . . . What is within exclusive federal authority may first have to be determined by this Court to be so." *Richman Bros.* case, *supra* note 122, at p. 455.

[126] A state may conceivably thumb its nose at this plea for renunciation for, under the holding in Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., Inc., 344 U.S. 178 (1952), a temporary injunction issued by a state court is not such a "final judgment or decree" within 28 U.S.C. §1257 as gives the Supreme Court jurisdiction to review. However, the Labor Board may seek a federal injunction when its processes have been invoked, Capital Service, Inc. v. N.L.R.B., 347 U.S. 501 (1954), although when its favors are not sought there is apparently no efficacious remedy. *Richman Bros.* case, *supra* note 122, at p. 457. Of course Congress may amend if state courts abuse this freedom, but the "scout's honor" approach of the Supreme Court is apparently working out fairly well in the state courts.

not either federally preempted or prohibited, assuming no undue burden upon interstate commerce results or other constitutional rights are not involved;

(10) Include in these areas of local jurisdiction and power the control of violence, mass picketing, abuse, threats, interference with property, etc., for "Policing of such conduct is left wholly to the states;"[127]

(11) Permit the states to select the method of control of the matters over which they have jurisdiction e.g., by making them unfair labor practices, by injunctions, suits for damages, etc.;[128]

(12) Forbid private persons from seeking federal injunctions preventing others from utilizing state processes merely upon an allegation that the state court is "wholly without jurisdiction of the subject matter, having invaded a field preempted by Congress;"[129]

(13) Authorize only the Labor Board, and then only when its processes have been invoked, to seek injunctive relief;[130]

(14) Make the congressional intent the key to this entire field of federal-state relations so as to permit state action in all areas not covered by the federal statute, e.g., common law suits for damages for tortious conduct even when such conduct is also a federal unfair labor practice;[131]

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[127] *Wisconsin Auto Workers* case, *supra* note 97, at p. 253. See also the *International Rice Milling* case, *supra* note 100, at p. 672.

[128] See, e.g., W.E.R.B. v. UAW-CIO, 70 N.W. 2d 191, 28 Lab. Cas. par. 69, 191 (1955).

[129] *Richman Bros.* case, *supra* note 122, at p. 455. This raises an interesting question: if the allegations are supported by a wealth of undisputed factual proof, must the federal district court grant the injunction? A careful reading of the *Richman* and *Anheuser-Busch* cases, and especially the dissenting opinion of Douglas in the former, conduces to a negative reply. The *Richman* opinion, at p. 456, contains this statement: "To hold that the Taft-Hartley Act also authorized a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify. To find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act."

[130] Under §10(j) of the amended Act the Labor Board has power, upon the issuance of a complaint, to petition a federal district court for a temporary injunction; however, under §10(1), charges brought under §8(b)(4)(A-C) may be treated differently. Now only a charge is required to be filed, plus an investigation and then "reasonable cause to believe such charge is true and that a complaint should issue," whereupon the Board "shall" petition for such an injunction. See also statement in *Richman* case, *supra* note 122, at p. 456.

[131] See, e.g., W.E.R.B. v. UAW-CIO, 26 Lab. Cas. par. 68, 711 (Wis.) Circ. Ct. 1954), where state power to act over conduct such as violence was upheld even though also an unfair labor practice federally, although where the conduct is an unfair labor practice federally and locally, without the presence of violence, etc., no state power existed to control the conduct. W.E.R.B. v. Chauffeurs, Teamsters & Helpers Local 200, 267 Wis. 356, 66 N.W. 2d 318 (1954). See also Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 75 S. Ct. 488 (1955), where six Justices agreed that no suit could be brought by a Union on behalf of its members for alleged "full salary" under

(15) Apparently prevent these indenpendent common law suits at the state level in section 8(b)(4) situations, for these are covered by and must conform to section 303.

In effect what is ultimately here concluded is that a complete turn-about has occurred in the general approach to the problems created by the federal-state conflict in labor relations. Prior to the present federal regulation it was the localities which sought to control such relation, the federal government entering on an ad hoc basis when its powers[132] or laws[133] were endangered or violated;[134] it was only when the general pressures of war and depression, as well as the particular pressures of public safety in transportation, were coupled with the realization that a national phenomenon had, like Topsy, "jest growed," that Congress sought to bring the multi-state chaos into national alignment. This was partly because of the inability of the states to control a gargantuan union, and it was thus for the same reasons that federal regulation of carriers and business had occurred previously, as well as it occurred simultaneously in the areas of social security, wages and hours, etc.[135] Congress, however, never fully and completely preempted or forbade local regulation so that, for example, states may require larger wage minimums, pay increased unemployment compensation, have their own anti-discrimination laws, nor did the federal legislation prevent local antitrust enforcement because of the national Sherman Act. It is only in exceptional situations that, in a field of concurrent power, federal preemption or forbidding of state action has occurred, e.g., the Old Age and Survivors' benefits program, and the general rule is to have the federal government move cautiously and partially. As a matter of fact, this is exactly what did

a collective bargaining agreement, the reason being that §301 of the Taft-Hartley Act did not envisage such a suit. There was disagreement, however, as to the reasoning by Frankfurter in his majority opinion (two Justices joined in it), for apparently Frankfurter opined that §301 was procedural only, and not substantive, whereas Reed felt otherwise, and Chief Justice Warren and Justice Clark refused to discuss the question. The conclusion of the Court, however, was a lack of federal jurisdiction in this type of suit, relegating the Union (if it could do so) to a state suit. Other problems arise under §301, e.g., can an arbitration clause be enforced when a suit thereunder is brought; can an injunction issue; etc.? These are not discussed here, although bearing on the jurisdictional aspect, because of the unsettled condition of lower and intermediate federal decisions.

[132] E.g., In re Debs, 158 U.S. 564 (1895).

[133] E.g., a long line of antitrust cases involving labor, beginning with Loewe v. Lawlor, 208 U.S. 274 (1908).

[134] As it does even today in the present Taft-Hartley Act, e.g., under the national emergency situation in §208.

[135] See, for example, the present outcry against the inability of states to control the evils resulting from pension and trust moneys which certain union officials have made a personal checking account. On the question of federal regulation of carriers because of state inability, and the historical, economic, political, and legal background, see Chapter III of this writer's forthcoming "The Consumer's Interest In The Sherman Antitrust Act," to be published January, 1956, by Dennis & Co., Buffalo, N.Y.

occur in labor relations, for the 1935 Wagner Act struck only against employer practices and the 1947 Taft-Hartley Act expanded this to include union practices; furthermore, these listed practices on both sides were not comprehensive but limited (or partial) regulations, and much remained with the states. By analogy, the past and the current approaches may be likened to definition by negation or affirmation; in negation both persons must theoretically know the entirety of the universe so that one may say (until the other understands), a horse is not a cow, not a fish, etc., whereas in affirmation one need know little except the language employed. So in the present area, if we desire to find out what a state may do, i.e., define its jurisdiction and powers, we may either list (generally) each and every item open to it, proceeding on the assumption that it may do nothing else, or say it may do nothing except what is expressly permitted it to do, thereafter particularizing its powers in piece-meal statutes, or we may even say that it may do and control everything not specifically forbidden or protected by the federal government. These principles, it is felt, tally with those found in the cases, although the first and second have never been utilized as either a judicial or legislative approach in the past; rather, it is the third which is the constitutional approach and which the judiciary began to employ with the turn of the last century, the federal government thereby denying and negativing particular state jurisdiction and powers, although today the trend, which at first aped this early approach, seems to be veering toward greater state autonomy and ability to control interstate commerce on the local level (at least in the field of labor relations).

If this analysis be correct then the consequences are disastrous for the national supremacy within its own bailiwick,[136] and it is the judiciary, not the Congress, which must shoulder the onus for these results.[137] For example, the question of jurisdiction has been discussed in general, but we may point up one particular aspect which the judiciary leaves quite unsettled. In an area of concurrent powers both federal and state courts have jurisdiction over the subject matter, so that either may take hold of the relation; if one has plenary power and may oust the other, the intent so to do must be found to exist before jurisdiction may be said to have been withdrawn; but, until such a finding is made, state courts have jurisdiction of the relation in order to determine their own jurisdic-

[136] *Richman Bros.* case *supra* note 122, at p. 461, per Douglas dissenting: "That course undermines the federal regulation; it emasculates the federal remedy . . . . The federal regulatory scheme cries out for protection against these tactics of evasion."

[137] E.g., in the *O'Brien* case, *supra* note 91, at p. 459, per Vinson: "In the Wisconsin Auto Workers Case, we concluded that the union tactic was 'neither forbidden by federal statute nor was it legalized and approved thereby.' . . . Clearly, we reaffirmed the principle that if 'Congress has protected the union conduct which the State has forbidden . . . the state legislation must yield.' . . . That principle is controlling here." While the principle is simply put and easily understood it is the "if" which creates the problem.

tion, i.e., to determine the congressional intent;[138] and if it is the federal intent and policy to effect only a partial withdrawal of jurisdiction then local courts definitely have unquestioned jurisdiction over the non-withdrawn portion, and still have temporary jurisdiction in the other portion until they have determined whether they have any jurisdiction therein. As a corollary, once the Supreme Court has determined such federal intent then all other courts must follow; and, in the ascertainment of the congressional desire, there should be no judicial equivocation or use of chameleon-like terms. Then how reconcile the practically-unanimous federal and state agreement that the latter have always had, and still have, a "traditional" jurisdiction over violence (the federal concern ostensibly involving only purpose), with the statement that "The complaint was not based upon violence, as such. To reach it, the complaint more properly would have relied upon §8(b)(1)(A) or would have addressed itself to local authorities."[139] For if violence as such can be reached under the federal Act then states are ousted of jurisdiction; or, even if the violence is to coerce for a purpose illegalized under section 8 (b)(4), or to prevent the enjoyment of rights under section 7, then states cannot act thereon. Whether so undiluted or diluted, violence cannot be attacked except through Board processes, and the results would be truly catastrophic. One rebels at these consequences and refuses to accept the logic's end, whereupon we must return to our fork in the road and say that Congress intended either to leave violence to state control or permit certain aspects of it to be concurrently or solely controlled by the Board; but if concurrent control of even one aspect is found then a possible crazy-quilt of control emerges, and this abhorred consequence necessitates a finding of sole control by the Board. But on this latter basis we are again returned to our just-rejected consequence so that our conclusion, based upon pragmatic considerations, must permit either sole local jurisdiction and control of violence (which is not so, as the Board has some control) or, in some degree, permit the federal Board concurrent jurisdiction and power, and it is this last conclusion which is the more reasonable in theory and in legislative intent and fact.

3.) The Discretionary Exercise of Powers by the Labor Board

If our preceding overall analysis is correct then it may be argued that Congress, and only Congress, may determine and delegate jurisdiction and also decide the conflict between the federal and state governments

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[138] E.g., United States v. United Mine Workers, 330 U.S. 258, 290-3 (1947), where the federal courts were held to have such temporary jurisdiction until they determined whether they had any jurisdiction, "Although a different result would follow were the question of jurisdiction frivolous and not substantial . . . ." At p. 293.

[139] *International Rice Milling* case, *supra* note 100, at p. 672, per Burton for unanimous court. In fn. 5, citing the *Wisconsin Auto Workers* case, *supra* note 97, at p. 253, the Justice quoted the purpose-method jurisdictional concept, *supra* note 121.

over the control of their labor relations; if it is the congressional intent and desire that the federal Board have jurisdiction over, say, the collective bargaining between railroad carriers and their employees, none can say it nay, nor can anyone prevent it from giving the Board jurisdiction over all businesses which come within the commerce power. Finally, and because of its plenary power over interstate commerce, Congress may delegate to the Labor Board jurisdiction: of a mandatory nature over all such businesses and (thereby) deny the states any power over them; over part only (or even none), but still deny the states power; over part only, but now give the states power over the (same and/or) other part; over all or part, and now permit the Labor Board to determine whether it will or will not exercise its power. It is this last situation which is examined in this subdivision, for if that is the congressional intent then a corollary and a question follow: as a corollary, Labor Board exercise of power within its jurisdiction, regardless of how manifested, disclosing an intent to settle federal policy within the area of its jurisdiction, withdraws local jurisdiction and forecloses any state action; as a question, does Labor Board rejection of jurisdiction, i.e., a refusal to exercise its powers with or without disclosing what it conceives the national policy (or interest) to be, permit states to enter this area? This question narrows our analysis but does not yet pin-point it, for the corollary discloses that such rejection or refusal may or may not indicate and settle federal policy. It is only when the corollary and the question are combined that a meaningful and pointed approach is possible, viz., that the Labor Board has been given jurisdiction, but this does not automatically and forever oust the states from exercising power within that delegated area where the Board discloses that it will not exercise its powers within its jurisdiction and a desire for local action therein may be inferred.

In other words the Board may be likened to an accordion player—the limit of its jurisdiction is the furthest stretch of the instrument although it has power to play one tune or another as it desires (subject always to the ability of Congress to call that tune); when it plays to the utmost then it is exercising its jurisdiction to the utmost and, conversely, states cannot exercise any jurisdiction within such preempted area; when the Board plays less then, inversely, states may control the remainder of the interstate area over which jurisdiction has not been exercised by the federal agency. Throughout, however, two questions of intent must always be answered, did Congress intend to delegate such a discretionary power to the Board to be able to refuse to exercise its jurisdiction with such a consequence and, if yes, then has the Board intended, by such an exercise of its discretionary power, that the states move in?

There is one area of the agency's delegated power in which congressional intent is definitely found that the Board may not be able to exercise the kind of discretionary power just analyzed, i.e., the Board's power to hold an election under section 209(b). There can be no questioning the lack of any state power to enter this field on the supposition that

the Board, when called upon, would decline to act. There are other such areas which can be mentioned, e.g., the power of the Board to formulate and promulgate rules and regulations, to seek temporary injunctions under section 10 (j and l), or enforcement orders under section 10(e). It is therefore obvious that Congress has not given the Board a flexible charter to be manipulated as the agency sees fit, but neither has an inflexible grant been made; what has occurred is that whereas the states formerly controlled the general field of labor relations in the interstate area through various methods, e.g., court decisions, injunctions, the federal government has now entered that area but found that it either cannot effectively or does not desire to control local matters. These latter are legally embraceable within the commerce clause, as we have seen in subdivision 1 of this article, and therefore within the federal jurisdiction if Congress desires to exercise its powers, but they are factually local, may not require any federal policy to be applied, may involve nothing or little of a national concern, and are possibly a (cumulative) hindrance upon the evolution and effectuation of a national labor relations policy. Administratively the agency would be able to concentrate upon matters of national concern if these local matters could be ignored; financially the agency has not been given a sufficiency of funds to process these minor cases even if it desired to do so; and economically (and politically), if not also judicially, state boards and courts have a clearer understanding of local conditions than does the national Board, where the local matters do not materially affect the national scene. From such a point of view it appears that the national labor relations policy would be better served and aided by permitting states to control such local matters, although with the federal Board retaining power to step in whenever it appeared in the national interest to oust the variegated state concepts and then formulate and apply a federal one.

Congress has gone along to a certain extent with this approach for, in section 10(a), it has said that the Labor Board could cede its jurisdiction over cases to local control provided the state's act and interpretation were not contrary to the federal policy. This, of course, would impose a national approach upon states in this interstate area and, to the extent that a different and perhaps unequal treatment of purely state cases would result if state policy were felt to be otherwise desirable, it is not to the best interest of a state to change its policy solely for the purpose of obtaining an increased jurisdiction. In effect this is the local view which has prevailed so that, to date, no Board cession has occurred. In the early years of the new Act, however, this congressional effort to obtain uniformity in interstate matters, large and small, via section 10(a), was dominant in Board thought; to what extent it influenced the first General Counsel in challenging the existence of the discretionary type of power just discussed is unknown.[140] What early occurred, however, was that

[140] For discussions on this conflict see FORKOSCH, TREATISE ON LABOR LAW, §230, pp. 650-1 (1953).

the Labor Board felt that it need not assert its powers just because it had jurisdiction and a charge was filed, whereas the General Counsel contended that jurisdiction compelled exercise when a complaint had been issued by him. Obviously the latter approach would have brought minnows as well as whales into the Board's jurisdictional net, and to the extent that it might have compelled states to seek Board cession under section 10(a), it would have somewhat effectuated congressional policy; to the extent, however, that Congress had clamped down on Board functions and staff operations through decreased appropriations, the General Counsel's approach would have imposed an insuperable burden upon the Board, resulted in an undoubted diminution in Board effectiveness, hindered the development of a national policy, and otherwise had harmful repercussions upon the federal labor relations approach. This conflict between Counsel and Board thus involved not a question of personalities (although to a degree this might have been true) but, basically, disclosed a congressional desire to try one method and to have a stand-by substitute in reserve if the first one failed. Since fail it did, the second method had to be utilized, and so in place of direct Board cession we find an indirect Board cession occurring, with states now setting their local policy imprimatur upon the interstate area but, in the discretion of the Board, only in those cases and to the extent it feels can not harm, even if it does not effectuate, the national policy.

The accordion policy of the Labor Board is therefore a necessary weapon to be used to strike down state incursions into the national area when these draw blood. It is true that one consequence of this modern sword of Damocles is to create confusion and uncertainty,[141] and to render wary state boards somewhat impotent to act, but the above analysis, if correct, removes these fears. States may today, it is here opined, act locally upon all interstate representation and unfair labor practice matters over which they have concurrent jurisdiction and which the federal Board has discretionarily refused to process, even though it has jurisdiction, except where the Board has indicated that it does not desire local power to be exercised.[142]

The factual development and application of this Board policy is

[141] See, e.g., the discussion by Lorenz, *Conflict, supra* note 65. At p. 414 the author writes: "Especially did a union find it necessary to run to the National Board if a case filed before the State looked dubious, in order to come within the six-month statute of limitations under the National Act," §10(b). This refers to the limitation upon the issuance of complaints where charges are filed more than six months after the acts are committed.

[142] This Board desire may be because, for example, it does not wish the subject matter to be locally touched, because it desires a national policy which is yet to be developed, because it has a settled policy which it will apply when it can, because of its inability to process matters due to personnel shortages due to inadequate appropriations etc. Regardless of the reasons why the, fact is—and the fact of this Board intent is a sufficient cause to reject local action. See also note 174, infra.

not difficult to trace. It antedates the 1947 amendments, for under the original Wagner Act the Board's members, in representation and unfair labor practice cases, did not seek to control peripheral matters except where the national interest required; the reasons were partly budgetary,[143] partly the tremendous increase in new cases in the 1945-1947 period,[144] and partly the necessity for developing a national policy. For example, the construction field was not entered because of its high degree of unionization and the existence of collective bargaining. However, by 1947, Congress had concluded that various union practices in the building trades, to illustrate, had to be curbed, although it also recognized that local control of various matters should be encouraged, e.g., section 14(b), and so new subd. (b) was added to section 8, castigating certain of these union methods as unfair practices. The amended statute was nevertheless unclear as to how far Congress desired the Board to exercise its conceded jurisdiction and control "local" businesses; the General Counsel felt that the Board should enter "to the full extent that the Act will permit," but the Board disagreed although, initially, a majority did assert its jurisdiction over some relatively local matters, the dissenters contending, however, that "The amended statute contains no language compelling a sudden expansion of this Board's jurisdiction, nor can we discover new policy considerations sufficient to warrant our intervening in a controversy inherently local in character."[145] The congressional mandate and consequent direction to the Board to assert its power in the building-construction industry was acknowledged, even by the dissenters, as being

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[143] See note 145, *infra,* and see MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY pp. 61, 400-1 (1950) for background.

[144] See 11th Annual Report (1947) pp. 68-9.

[145] The *Liddon White* case, *infra,* at p. 1184. In December, 1941, in Newton Chevrolet, Inc., 37 N.L.R.B. 334 (1941), the Board asserted its power over retail automobile sales and servicing agencies, but this power was "quietly interred" (Liddon White Truck Co., Inc. 76 N.L.R.B. 1181, 1184 [1948] [a dissent]) although as late as July, 1947, the Board directed an election where a local outfit rebuilt and resold, at retail and by mail order, used auto parts, buying outside the state over $100,000 of parts and selling outside the state over $200,000. Warshawsky & Co., 74 N.L.R.B. 577 (1947). The following month, however, with one dissent, the Board rejected power over a retail sales and servicing auto agency where outside purchases were approximately $51,000 and outside income was $189,000, of a total volume of business of $2,600,000. Herff Motor Co., 74 N.L.R.B. 1007 (1947). How much the 1941 assertion of power was spurred by the increased appropriation of approximately $500,000 (Reilly also replaced E. S. Smith in October) is conjectural; in 1947, however, the Taft-Hartley Act became law although the *Warshawsky* and *Herff* cases were decided by the three-man Board of Herzog, Houston and Reynolds, Houston dissenting in the *Herff* case. In the first case under the new five-man Board, operating with a five million dollar budget which was upped the following year by almost four and a half million dollars, the Houston dissent apparently prevailed as Reynolds and the two new appointees joined him, although Murdock deserted him and now dissented with Herzog in the *Liddon White* case *supra.* The dissent contains the following two paragraphs: "We would grant the Employer's motion to dismiss,

"justified by special considerations,"[146] but the "general change in policy" was fought into the following year[147] when, because the employer's operations were "essentially local in nature," a new majority declined jurisdiction.[148] There thus evolved a Board approach which included a continuing[149] general policy, to be developed and applied by the agency

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rather than exercise jurisdiction in this case of a retail automobile dealer. We do not question our colleagues' conclusion that it is constitutionally possible to assert the Federal power here, but we say that it is administratively unwise to do so. The fact that this Board may do something does not mean that it must or should." "Although this case relates only to a retail automobile dealer, we also voice concern at the general change in policy that it portends. Throughout 1945, 1946 and 1947 the old Board, in administering the Wagner Act, refrained from exercising jurisdiction in situations that have an essentially local flavor," citing cases in a footnote.

[146] The *Liddon White* case, *supra* note 145, at p. 1184, fn. 3: "The Board's recent assertion of jurisdiction over the building-construction industry, which appears to have more local attributes than the trade involved here, is justified by special considerations. In enacting the amendments to the Act, the 80th Congress directed particular attention to jurisdictional disputes and other practices that were conspicuously characteristic of the building trades. If constitutional power exists, as we believe it does, the Board would be derelict in its duty if it did not exercise that power at a point that was the express subject of Congressional concern."

[147] Central Sash & Door Co., 77 N.L.R.B. 418, 420 (1948), the two dissenters referring to the *Liddon White* case for their reasons.

[148] Duke Power Co. 77 N.L.R.B. 652 (1948). The dissenters in the *Liddon White* and *Central Sash* cases were now joined by Member Gray, with Houston and Reynolds now becoming a minority and dissenting. This new policy was followed in J. E. Stone Lumber Co., 78 N.L.R.B. 627 (1948) (Gray not participating), and Midland Bldg. Co., 78 N.L.R.B. 1243 (1948), (Houston not participating), with fn. 1 at p. 1243 referring to 10 East 40th Street Bldg., Inc. v. Callus, 325 U.S. 578 (1945), and remarking: "Although our jurisdiction is broader than that under the Fair Labor Standards Act, and this decision is not decisive as to our legal jurisdiction in this situation, the characterization of such an enterprise [operation of an office building] by the Supreme Court as essentially local is of persuasive significance in a policy determination in connection with the assertion of jurisdiction."

[149] Pappas v. American Guild of Variety Artists, 125 F. Supp. 343, 348 (N.D. Ill. 1954): "Indeed, the Act of 1947 itself represents a comprehensive revision of all federal legislation affecting labor disputes and the NLRB had decided well before that date that it would not resolve disputes in the entertainment industry. With this policy before it Congress decided to re-enact the jurisdictional language of the former . . . Act without alteration. In the opinion of the court this amounts to nothing less than Congressional ratification of the policy of the NLRB." See also Hotel Association of St. Louis, 92 N.L.R.B. 1388 (1951), a 3-2 decision rejecting jurisdiction over the hotel industry, thereby continuing its pre-1947 policy, and citing and quoting from Senator Taft's remarks that in his "opinion the Act was never intended to cover the hotel industry." Member Murdock, in that case, was a dissenter. This rejection of jurisdiction points up the possibility of a change in policy, and the Miami Beach hotel strike which began in April and still (in September) continues, found the Florida courts enjoining the strikers, with the latter now appealing to the federal Board to assert jurisdiction (which would destroy the basis for the state's assertion of

under its generally delegated powers, and a special policy, mandated by Congress, and to be applied regardless of the Board's policy views in the matter and regardless of even decreased appropriations.[150] To the Board's acquiescence to congressional desires that it extend and exercise its power in the building-construction industry there was now added a majority view that "the legislative history of the 1947 amendments is replete with evidence that, especially where secondary boycotts were concerned, Congress intended the Board to exercise its plenary power to protect small and relatively local enterprises against the impact of union boycotts aimed at the *installation* of materials furnished by primary employers, the interstate character of whose business is clear."[151]

In this additional approach there was concurrence and dissent,[152] the latter splitting on the question of congressional intent, thereby pointing up the Board's own policy considerations which nevertheless were to be subservient to the legislative desires. These general and special policies

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jurisdiction). On August 26, 1955, by a 3-2 vote, the Board refused to change its policy, adhering to its previous position. In re Local 255, Hotel & Restaurant, etc. Union, 113 N.L.R.B.

[150] For example the first appropriation under the new Act was the high for the Board since its inception, namely, $9,400 (thousands omitted); since then the appropriations have been: fiscal 1950—$8,605; 1951—$8,582; 1952—$7,885; 1953—$9,000; 1954—$9,125; 1955—$8,400; 1956—proposed $8,150. The Board has, nevertheless, continued to exercise its jurisdiction over building trades and matters involving secondary boycotts, *infra* note 151. There is no evidence bearing upon the possible effect of the requirements of new §9(f-h) concerning filing of union reports, constitutions and non-Communist affidavits, for while the workload of the Board was reduced during 1947 there is no causal connection established between this decrease and the ability or desire of the Board to handle more cases.

[151] Watson's Specialty Store, 80 N.L.R.B. 533, 535, (1948), emphasis in original. In this case Watson's operated in seven states and did a concededly interstate business, being substantial enough to have the Board exercise its jurisdiction if the business alone were involved. A home owner, Stanley, contracted with Watson's to remodel his residence and the union now induced a strike of Watson's employees who worked on Stanley's home. Said the Board, at p. 535, "While it may be conceded that the complainant Watson's work on the Stanley residence constituted a relatively small portion of Watson's business whose impact on interstate commerce could in isolation, be regarded as *de minimis* [the legal concept discussed in sbd. 1, *supra*], the effect of the Respondent's unfair labor practice on interstate commerce "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others . . . , the total incidence of which, if left unchecked, may well become far reaching in its harm to commerce,' " citing the *Polish National Alliance* case, *supra* note 21, at p. 648.

[152] The *Watson* case, *supra* note 151, at p. 540, where Chairman Herzog concurred "because explicit statements in the 1947 legislative history reveal an affirmative intention by Congress to invoke its full Constitutional power to prevent secondary boycotts, even where their immediate impact is only on local

were thus developed somewhat independently of the General Counsel's views although, from his appointment in August of 1947 on, the Counsel insisted upon the exercise of power "to the full extent," the disagreement being aired before the Ball "Watch-dog" Committee the following year.[153] The Board, as we know, emerged the victor in this conflict, for not alone could it refuse to decide an unfair labor practice case even where the General Counsel had issued a complaint,[154] but in September of 1950 the latter resigned and the disagreement vanished.

But what was the effect of the Board's assertion of jurisdiction over an industry, as with the building-construction industry, because of congressional intent? Did this compel the exercise of power over every employer in that industry or was there discretion even in that area? During the spring of 1948 a house committee "sharply criticized the [Board's] policy of extending the jurisdiction of the Act over small business," and, by the fall of that year, "dissatisfaction was aroused both in small-business circles and in Congress."[155] In March, 1949, the Board dismissed a complaint issued under sections 8(a)(3) and 8(b)(2) because "The question before us is one of discretion, not of power. . . . Nor does Mentzer's status as a building contractor dictate a different conclusion."[156] The dissenting Member felt that "once the Board has elected to assume jurisdiction over a given industry, it has chosen a path which generally should be followed," whereas the concurring Chairman felt that while this case was like the *Watson's Specialty* case, where jurisdiction had been exercised, still "a different result is permissible and warranted here because the section of the Act involved has a different legislative history. Here we have discretion to decline to assert juris-

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enterprises. If, however, I thought the exercise of Board discretion, permissible, I would, consistently with the view expressed in recent representation cases, refrain from applying the Federal power to so local and so diminutive a controversy." Houston dissented because "the effect on commerce here is so remote and so insubstantial and the controversy involved is so local in character as to make undesirable any exercise of the Federal power. I see no compulsive consideration in the legislative history of the amended statute which would dictate the contrary merely because the operation involved concerns the building and construction industry."

[153] This was appointed under Title IV of the Taft-Hartley Act, but since fallen into limbo. For citations to the legislative hearings referred to herein, see Millis & Brown, *supra* note 143, at pp. 401, fn. 16, and 402, fn. 19.

[154] E.g., A-1 Photo Service, 83 N.L.R.B. 564 (1949); Haleston Drug Stores, Inc. 86 N.L.R.B. 1166 (1949), upheld in Haleston Drug Stores, Inc. v. N.L.R.B., 187 F. 2d 418 (9th Cir., 1951), *cert. den.* 342 U.S. 815 (1951).

[155] Note 153, *supra,* giving references.

[156] Walter J. Mentzer, 82 N.L.R.B. 389, 391 (1949), Gray not participating, with Herzog concurring and Reynolds dissenting. Herzog, however, concurred in this exercise of discretion, although for reasons given below, so that a majority of the Board did agree on this approach.

diction; there we unfortunately had none," for Congress had disclosed an intent that the Board "exercise the *full* constitutional power of the Federal Government to prevent secondary boycotts [under section 8(b)(4)]. Therefore, despite unwillingness to intervene in 'so local and so diminutive a controversy,' I agreed that the Board had no choice but to proceed" in that case whereas "Here, however, there is no such compulsion present. These alleged unfair labor practices are of a different character."[157] The exercise of the Board's powers may thus be classified within three areas: representation and decertification petitions—the Board has and exercises discretionary powers; unfair labor practice complaints under all subdivisions of section 8(a) and (b) except section 8(b)(4)(A-D)—ditto; unfair labor practice complaints under section 8(b)(4)(A-D)—mandatory exercise of power.[158]

The legal de minimis doctrine, discussed in subdivision 1, may now be contrasted with and differentiated from the Labor Board's discretionary de minimis doctrine, for whereas the former ousts Congress and thereby the Board from any jurisdiction over the particular subject, the later acknowledges legal and delegated jurisdiction but does not exercise its powers thereunder. This is not to say that every Board rejection is based upon a financial de minimis concept but, rather, that the term gives one reason which may be utilized to answer the question why the Board does not choose to exercise its conceded powers.[159]

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[157] *Ibid.*, at pp. 393 and 392, respectively. Herzog continued: "My reply to Mr. Reynold's dissent simply is that Congress provided us with no parallel legislative history with respect to these practices. It follows that the Board is as free here as it was under the Wagner Act, and as all agree it has been in representation cases since the amendments, to exercise discretion to take or to decline to take jurisdiction."

[158] See, e.g., the *A-1 Photo* case, *supra* note 154, at p. 565: "Under Section 10 of the Act, as amended the Board is 'empowered' to prevent any person from engaging in any unfair labor practice, 'affecting commerce,' but it is not *directed* to exercise its preventive powers in *all such cases.*" See like agreements by Courts of Appeal in the *Haleston Drug* case, *supra* note 154, and Progressive Mine Workers, AFL v. N.L.R.B. 189 F. 2d 1 (7th Cir., 1951); see also N.L.R.B. v. Indiana & Michigan Elec. Co. 318 U.S. 9, 18 (1943); N.L.R.B. v. Red Rock Co. 187 F. 2d 76 (5th Cir., 1951), *cert. den.* 341 U. S. 950.

See also Breeding Transfer Co. 110 N.L.R.B. No. 64 (1954), fn. 3, quoting from Herzog's 1949 testimony before a Senate committee: "It has been the position of the Board that the Federal Government should not use its constitutional power right up to the hilt. In other words where something has a local flavor to it, . . . we should [not] waste" federal effort and funds on it. "That was the practice under the Wagner Act and there was nothing in our opinion in the legislative history of the Taft-Hartley Act to require change with the possible exception of some variation in secondary boycotts and possible jurisdictional disputes as well."

[159] E.g., United Tel. Co. of the West, 112 N.L.R.B. No. 103 (1955): "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: ' . . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide

There are thus numerous reasons, constitutional, statutory, and discretionary, why jurisdiction is not exercised over particular matters, and it is the last of these three general reasons which is of present concern. How is it possible for employers, employees, and (union) representatives to know when and also under what circumstances they are subject to federal or state regulatoin by boards or courts? Whose policies apply, and whose law is to be enforced? If a case-by-case approach is to be utilized in this discretionary area then confusion worse confounded results. The business and labor outcry against the application and results of such a Board discretion reached a point where the Board, in late 1950, felt that the "time has come, we believe, when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line [of discretion] can best be drawn."[160] A series of decisions thereupon became the peg upon which to hang a listing of nine general standards for the advance determination of the Board's exercise of its jurisdiction and, after a period of approximately four years' experience under these standards, a reassessment occurred and various modifications were spelled out.[161] "In making these modifications," said the majority, "we have given due consideration to all of the criteria spelled out by the Board in 1950, including (1) the problem of bringing the case load of the Board down to manageable size, (2) the desirability of reducing an extraordinarily large case load in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) over-all budgetary policies and limitations. If one of the inevitable consequences of our action is to leave a somewhat larger area for local regulation of disputes, we do not share our colleagues' apparent view that this is a sinister development. We do say, however, that a desire to establish broader State jurisdiction is in no wise a factor in our decision. We are concerned here solely with the problem of defining the limits of our jurisdiction pursuant to the discretionary power vested in us by the Congress."

whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act'." Citing Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943), *enf'd.* 141 F. 2d 785 (9th Cir., 1944); Crown Zellerbach Corp. 95 N.L.R.B. 753 (1951).

[160] Hollow Tree Lumber Co., N.L.R.B. 635, 636 (1950). See also 16th Annual Report (1952) p. 15: "For many years, the question of where to draw the line necessarily turned upon the facts of each case as it came before the Board for decision. But early in the 1951 fiscal year, after long study of the pattern emerging from past decision, the Board issued a series of unanimous decisions setting forth more precisely the standards to govern its future exercise of jurisdiction in the 48 States."

[161] On July 1st (Release #445) and 8th (#449) the Board announced its new rules, but in between, on July 8th (#448), the General Counsel dismissed two investigations into unfair labor practice charges, the reason being that the new standards did not permit complaints to issue. However, it was not until October

It is unnecessary to list or develop in extenso these amended standards except to note that they resulted in a narrowing of the area in which the Board's powers would be exercised and, in the words of a newspaper headline, "thousands of businesses are freed of jurisdiction in labor relations."[162] The new standards, for example, increased the dollar minimums of sales and purchases which had to be met before the concern would come under the Board's discretionary jurisdiction, applied dollar minimums now to public utilities and transit systems, as well as to concerns engaged in businesses related to the national defense, rejected jurisdiction based solely upon operation under a franchise from a national enterprise, freed general or public office buildings from Board jurisdiction grounded merely on the fact that the buildings had tenants over which jurisdiction was taken, and refused to exercise jurisdiction over public restaurants.[163]

What was the effect of this 1950 and 1954 enunciation of standards? For instance, did a state now have jurisdiction and power over an

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28, 1954, that the Board itself was able to apply the new standards to a series of eight cases. Breeding Transfer Co., 110 N.L.R.B. No. 64 (1954), is the most important, for here Murdock dissented vigorously and, in the words of the majority of three, took the position "that the Board was required by law to exercise the fullest reach of its jurisdictional powers," while Peterson agreed with the majority in that "the Board is not legally precluded from adopting new jurisdictional standards," he nevertheless felt the new plan to be of an "arbitrary and categorical character."

[162] N. Y. Times, July 15, 1955. As expressive of congressional desire that discretion be so exercised, see the colloquy between Congressmen Kersten and Hartley on June 4, 1947, on the floor of the House, 93 Cong. Rec. 6540: "We are very anxious that disputes be settled at the State level insofar as is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language of the report?" To which Hartley responded that that was the sense of the bill and the report, whereupon Kersten asked: "And it will permit as many of these disputes to be settled at the State level as possible?" "Exactly," replied Hartley.

[163] There have been interpretations and qualifications of these criteria in cases decided subsequent to October 28, 1954, e.g., Tanner Motor Tours, Ltd., 112 N.L.R.B. No. 39 (1955) (Murdock dissenting), holding that local, charter, pleasure tour, sight-seeing motor tour operations are not "public transit company" matters within The Greenwich Gas Co., 110 N.L.R.B. No. 91 (1954), and Rollo Transit Corp., 110 N.L.R.B. No. 228 (1954), cases. See also The Scranton Times, 111 N.L.R.B. No. 128 (1955). One of the most important Board decisions, however, is Cantera Providencia, 111 N.L.R.B. No. 141 (1955), the opinion stating that "in the present case and in future cases the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States." See also South P.R. Broadcasting Corp., 111 N.L.R.B. No. 45 (1955). It obviously requires separate treatment to develop adequately not alone these aspects of the Board's jurisdictional standards, but numerous others as well; problems of space preclude this analysis, and so we confine our discussion to the matters here set forth, although as to secondary boycotts and the criteria governing when the primary employer's business does not bring him within the dollar standards, see Jamestown Builders Exchange, Inc., 93 N.L.R.B. 86 (1951), and Sand Door & Plywood Co., 113 N.L.R.B. No. 123 (1955).

industry or concern just because the Federal Board could not or did not exercise jurisdiction or power? This is too broad a statement, as the discussion in subdivisions 1 and 2 above have shown, so that we inquire whether, in the area of concurrent jurisdiction, and when and where the Labor Board's self-effacing policy is applied, the states may automatically act so long as the Board does not indicate a negative desire.

We have, in subdivision 2, utilized the *Bethlehem Steel* case to illustrate how the positive jurisdiction of the Labor Board, regardless of its vacillating exercise, prevents state action, and we now refer to it for one of the last comments in the majority opinion, "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary, or other reasons presents a different problem which we do not now decide."[164] That decision has never been squarely presented and made[165] but, from every indication, congressional, judicial, and Board, which has been presented to now, the conclusion is reached that Board withdrawal from an area of concurrent jurisdiction permits state entry and control.[166] This general statement is nevertheless subject to exceptions and limitations other than those already discussed; for example, does Board certification automatically oust state boards from asserting any jurisdiction whatsoever? Insofar as certifications are concerned, a Board affirmative certification or a refusal to certify but acceptance of jurisdiction, ousts state boards from entering this area, since the *Bethlehem Steel* case has not been reversed judicially or congressionally; however, insofar as unfair labor practice complaints are concerned, while states may not enter the field taken up in section 8, still they are free to enforce "their own policies in matters not governed by the federal law," as "The character of activities left to State regulation is not

[164] Bethlehem Steel Corp. v. N.Y.S.L.R.B., 330 U.S. 767 (1947). In a separate opinion, joined in by Murphy and Rutledge, Frankfurter contended that if such suggestion permitted states to exercise jurisdiction when the Board felt it could not afford to, then a deliberate cession (as was there involved) should prove a greater prop to state action. At p. 778. One of the reasons for the Board's "desire to share burdens that may be the State's concern no less than the Nation's," concluded the Justice, is the (then) increasing backlog of cases. At p. 783.

[165] As late as 1954, in Bldg. Trades Council v. Kinard Constr. Co., 346 U.S. 933 (1954), it was said that "the Court does not [here] pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the board decline to exercise its jurisdiction." Thus the Supreme Court's numerous statements that "the Board sometimes properly declines to [take jurisdiction] . . . , stating that the policies of the Act would not be effectuated," N.L.R.B. v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951), do not supply the answer to whether the states may now move in.

[166] The judicial concepts explored in subds. g and h are to be meaningfully applied to this analysis, although disagreement with the conclusions may be found, e.g., Universal Car & Service Co. v. International Association of Machinists, etc., 27 Lab Cas. par. 68, 825 (Mich. Circ. Ct., 1954). However, for a contrary opinion, and with which this writer concurs, see Truck Drivers, Chauffeurs, etc. Local No. 941 v. Whitfield Transportation, Inc., 27 Lab. Cas. par. 68,863 (Tex. Sup. St., 1954).

changed by the fact of certification."[167] But if no federal jurisdiction has been sought, either in a representation or a complaint proceeding, then conclusion 6 of subdivision 2 applies, that the possibility and not the probability of Board acceptance of jurisdiction is sufficient to oust the state of jurisdiction[168] unless there is a "clear showing . . . that it would be futile to do so . . . ."[169] If such a clear showing is made, or the federal Board has actually declined to exercise its discretionary powers because of the reasons examined, then local action is permissible. To what extent may such local powers be exercised? At present it would appear that lower state courts feel no federal impedimenta are raised to complete state action[170] but, it is suggested, this is incorrect; national policy, or Board interpretation thereof, still control, so that except for specific congressional acquiescence in local supremacy, e.g., section 14(b), states cannot, in the exercise of powers voluntarily abnegated by the Board, create a conflict in policy. This, it is submitted, is not alone logical but

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[167] The *Algoma Plywood* case, *supra* note 94, at pp. 315, 316. "So far as the relationship of State and national power is concerned, certification amounts to no more than an assertion that as to this employer the state shall not impose a policy inconsistent with national policy . . . or the National Board's interpretation of that policy . . ."

[168] E.g., N.Y.S. Labor Relations Board v. Wags Transportation System, Inc., 284 App. Div. 883, 134 N.Y.S. 2d 603, 604 (1954): "It is not sufficiently clear that the National Labor Relations Board . . . would have declined jurisdiction in the state of facts disclosed in this case . . . . There being no clear showing that the National Board would not have assumed jurisdiction . . . the appellant [state board] could not assert jurisdiction."

[169] The *Kinard Construction* case, *supra* note 165. See also La Crosse Telephone Corp. v. W.E.R.B., 336 U.S. 18, 25 (1949), where state board jurisdiction to certify was denied because "the industry is one over which the National Board has consistently exercised jurisdiction." Because of the "potentials of conflict," even though the federal Board had not yet applied itself "in any formal way to this particular employer," there could be no state action save through cession under §10(a). At p. 26. It is submitted that the exceedingly strict reasoning in these sentences is not acceptable today for, under its dollar criteria, the federal Board may assert jurisdiction over half of an industry, and reject it over the other half (or any other proportions desired); but if even one concern in an industry is thus embraced on a discretionary basis, all others are cast into a no-man's land, for now the Labor Board won't, and the states can't. The policy of the courts and the Congress has either changed or become more sophisticated.

[170] E.g., Satin, Inc. v. Local Union 445, IBEW 26 Lab. Cas. par. 68, 508 (Mich. 1954), upholding an injunction against picketing where the court felt the federal Board had declined, and would continue to decline, jurisdiction; Drivers, Salesmen, Warehousemen, etc. Union No. 695, AFL, CCH Lab. Law. Repts., par. 49, 280 (Wisc. 1954), where the Wisconsin board ordered an election when it found the federal Board would decline to act. See also 6 LAB. L. J. 602-4 (1955) where the views of the New York and Wisconsin Boards are given, and the Michigan Board is quoted, all feeling that they had jurisdiction over inter-state employers who did not meet the federal Board's jurisdictional standards regardless of that Board's inaction. See also note 174, *infra*. Despite these views, this writer's opinion, keyed to note 171, is adhered to.

also more in consonance with the national interest and the national will, i.e., congressional desires.[171]

For example, congressional policy is disclosed in the proviso to section 10(a) whereby Board cession in unfair labor practice cases is permitted when state policy therein conforms to the federal. However, this ability to cede is limited by the parenthetical withdrawal of such power over "mining, manufacturing, communications, and transportation except where predominantly local in character." The federal Board can therefore cede matters in the area of transportation only when they are predominantly local, but exactly what does this clause mean? To illustrate, a three-truck, ten-employee trucker does business of an exclusively interstate character, but operates from his home, purchases all equipment locally, etc.; his gross annual income is $45,000, whereas under the new standards the Board will exercise jurisdiction over intrastate trucking firms which are links in interstate commerce only if they do at least $100,000 business annually for concerns in certain other categories over which jurisdiction is to be exercised; the Board refuses, whether or not correctly and properly, to bother with our hypothetical trucker; can the state take over? The answer should be no, for the trucker is not doing an intrastate trucking business (his purchases of equipment, etc. do not make him an intrastate concern), the express prohibition against cession is an indication of congressional intent that states not enter the field even if the Board refuses to exercise its powers, and a national policy must be federally set for such interstate concerns. Or, as another example, Congress has said, in section 9(f-h), that unions cannot apply to or use the processes of the federal Board unless they file certain information and their officers file non-Communist affidavits. The Board's discretionary policy excludes a concern, and a non-complying union seeks local aid, no such filing requirements being found in the state act. There might possibly be no

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171 Strong arguments can be levelled against this conclusion, e.g., it may be said that under this interpretation the state boards would become merely local sub-agencies of the National Board without being compensated; that states having their own statutes would be forced willy-nilly, to either conform entirely or else have two sets of rules, one for interstate and the other for intrastate businesses: that such a confusing and unfair pattern would cause either rejection of the former or else force the states to close up shop; in either of these last two situations there would be a no-man's land in federal labor relations. Also, Congress attempted to compel states to conform, via §10(a)'s cession proviso, but the failure of this bait has now convinced Congress, the Board and the courts that a discretionary cession must carry with it a corresponding freedom to determine local policy. (This last may be a boomerang, however, for the proponent of national policy and uniformity even in state action may argue that a clear indication has been thereby given by Congress that states must conform when they act; this is doubly bolstered by reference to §14[b] which discloses a specific congressional exception to the general rule of §10[a], and also to the fact that Congress knew and spoke of the *Bethlehem Steel* case in framing the latter section.)

cession under section 10(a)[172] but this is immaterial; congressional policy is disclosed and the question is whether the Board can frustrate this policy by its discretionary exercise of its power. To this writer the intent of Congress in this field is uncertain, but it is suggested that the filing requirements not be impediments in this area of discretionary jurisdiction by States for then a true no-man's land of chaos and uncertainty would become a fact. Furthermore, the statutory cession's proviso is a general one applying to a requirement applicable to unfair labor practices, whereas the Board's discretionary policy permits discretionary cession in representation cases; this argument, of course, is not too secure a foundation upon which to build the conclusion suggested, but even one slight indication takes on additional strength when cumulated with others. However it may be rationalized, congressional intent and policy are here different, so that different approaches are possible federally and locally.

But even if these views are incorrect the Board still retains power, whenever it sees fit, to assume jurisdiction, set national policy, and thereby denounce all such local assumption of jurisdiction and conflicting interpretations. But a still more intriguing problem emerges—an interstate business does not come under the Board's discretionary powers because of a low dollar volume; the state board assumes jurisdiction and now, under state law, a closed shop contract is permitted, or supervisors or guards may join the bargaining unit, etc.; can the federal Board overthrow such a valid contract, or is it deprived of jurisdiction during the term of the state certification or bargaining agreement or both? The answer must be in favor of national jurisdiction, so that local boards, unions, and employers must dance to the tune played by the Board.[173] Of the numerous possible curious results which may flow only one need here be mentioned: the Board rejects jurisdiction and the state board certifies a union; the employer refuses to bargain and the state board finds him guilty of an

[172] This may be questioned as the language of the proviso speaks of inability to cede where "the provision . . . applicable to determination of such ["unfair labor practices (listed in section 8)"] cases . . . is inconsistent with the corresponding provision of this Act" etc. This limitation upon cession therefore requires parallelism in §8's listings of unfair labor practices and apparently does not concern itself with the other provisions of the Act.

[173] There appears to be one exception to this, found in N.L.R.B. v. Guy S. Atkinson Co., 195 F. 2d 141 (9th Cir., 1952). There the Board had refused jurisdiction over construction projects during which period the contractor executed a closed shop contract and now fired his employee for the latter's failure to remain a union member; the Board now asserted jurisdiction, held an unfair labor practice had been committed, and ordered reinstatement, etc. The Ninth Circuit refused to enforce because such retroactive application of policy conflicted with §3(a)(3) of the Administrative Procedure Act, made applicable by §6 of the Labor Act, the former statute requiring publication in the Federal Register of "statements of general policy or interpretations." The conclusion may be fair although the reasoning is questionable, for the court here is confusing rules and regulations, and statements of policy, with press releases, and with judicial-type decisions.

unfair labor practice, obtains a state enforcement order, and the State's highest court affirms; we may even venture that the Supreme Court refuses certification or else affirms, agreeing that federal rejection empowers such state action; the employer is now under a mandate of the state and federal highest courts to bargain, whereupon he (or his employees) now applies to the federal Board for a representation election or for an unfair labor practice holding; the federal Board reverses itself and assumes jurisdiction; thus, with the stroke of their pen, three federal appointees set at naught the months and years of state (and even federal Supreme Court) efforts! Fantastic, yes, but possible, yes, and this, of course, results in unsettling, rather than settling, the course of labor relations in and which affects interstate commerce;[174] any other conclusion, however, would permit a delegatee to bind its delegator when the latter had refused to be so tied and had never delegated such power, i.e., the Board would be able to act ultra vires and render itself impotent to act when Congress had commanded it have the ability to act, even though it need not.[175]

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[174] See also the *La Crosse Tel.* case, *supra* note 169, at p. 26, where a stronger conclusion is reached: "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy." Despite the tenor of our discussion concerning the disruption of industrial peace, laid at the door of the federal Board, what of legislation such as that just passed by New York, L. 1955, chap. 764, eff. April 28, 1955, providing that the state's Labor Relations Act is not to apply to the employees of any employer who concedes to and agrees with the Board that such employees are subjejct to and protected by the provisions of the federal Act or the federal Railway Labor Act. Assume Jones does so concede and agree to federal coverage, does this mean that the federal Board must accept jurisdiction? The obvious answer is no, and we are once again back to the Counsel-Board feud previously discussed, with its jurisdictional consequences. Nevertheless, the problems of federal-state jurisdiction are so onerous that the states, as well as the federal government, seek for a way out of the morass of vacillating decisions and policy.

[175] This confusion is not found only in this aspect of the Taft-Hartley Act, for the Sixth Circuit has upheld a Board finding that no 8(b)(4) violation occurred while simultaneously upholding a jury's verdict and finding that such a violation had occurred. See United Brick & Clay Workers of America v. Deena Artware Inc. 198 F. 2d 637 (6th Cir., 1952); N.L.R.B. v. Deena Artware, Inc., 198 F. 2d 645 (6th Cir., 1952). The reasoning of the court, however, is unquestionably correct and is a convincing illustration of proper judicial review. Another source of confusion may be found in §302, for subd. d makes it a misdemeanor to violate any of the provisions of the section, among which are prohibitions upon employer giving and union representative accepting of bribes; suppose the Board rejects jurisdiction over a union because the employer does not come within one of its standards, does this oust the federal attorney from prosecuting? If so, the Board can immunize conduct which Congress has made criminal, and this consequence was never intended; thus a Labor Board "no" does not necessarily mean a federal attorney "no."